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No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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DONALD P. HODEL, SECRETARY OF THE INTERIOR,
APPELLANT

*v.*

MARY IRVING, ET AL.

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*ON APPEAL FROM*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe, results in a taking of private property without the payment of just compensation, in violation of the Fifth Amendment to the Constitution.

2. Whether the court of appeals erred in holding that Section 207 of the Indian Land Consolidation Act, as amended by Congress in 1984 (Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*), also is unconstitutional, even though the amended version does not apply to any of the interests in allotments covered by appellees' decedents.

## PARTIES TO THE PROCEEDING

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross. The appellees sought to represent a class of all heirs and potential heirs affected by Section 207 of the Indian Land Consolidation Act of 1983.

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 758 F.2d 1260. The opinion of the district court (App., *infra*, 21a-25a) is unreported.

### JURISDICTION

The judgment of the court of appeals (App., *infra*, 18a) was entered on March 29, 1985, and the petition for rehearing was denied on June 6, 1985 (App., *infra*, 19a). The notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on July 2, 1985 (App., *infra*, 20a). By order dated August 29, 1985, Justice Blackmun extended the time within which to docket the appeal to and including October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. a. The whole of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 98 Stat. 2517-2519, 25 U.S.C. 2201 *et seq.*, is reproduced at App., *infra*, 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at App., *infra*, 32a-36a.

b. Section 207 of the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendent [1] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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[1] So in original. Probably should be "descend".

Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, as amended by the Act of October 30, 1984, Pub. L. No. 98-608, § 1, 98 Stat. 3173, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the decedent's death.

Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a), any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a), provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

## STATEMENT

This case concerns the constitutionality of Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which was enacted to address the numerous problems created by the increasingly fractionated ownership of Indian allotments. Section 207 provides for the escheat to the tribe concerned of certain de minimis undivided interests in allotments upon the death of the owner of such an interest. Before stating the facts of the case, we shall first describe the historical background and explain the original and amended versions of Section 207.

### A. Historical Background

1. The allotment policy commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, which was followed by a number of statutes

providing for the allotment of land on individual reservations. See *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 3-5; *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The particular statute involved here, the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, provided for the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of land on those reservations to individual Indians.

Under the allotment acts, individual members of the tribe typically received an allotment of 160, 80, or 40 acres, depending upon their marital status and age and the type of land involved, and the remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, § 1, 24 Stat. 388. This pattern was followed in the Sioux statute. § 8, 25 Stat. 890. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that the allotted parcel was to be held in trust by the United States for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389; 25 Stat. 891. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980).

The allotment policy ultimately was repudiated by Congress in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1979); *Mattz* v. *Arnett*, 412 U.S. at 496 n. 18. In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the trust or restricted period of existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus unalloted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)).

2. The length of the period during which allotments were to be held in trust made it necessary for Congess to provide for the disposition of an allotted parcel upon the death of the original allottee. Thus, Section 5 of the

General Allotment Act and Section 11 of the Sioux allotment statute provided that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located" (24 Stat. 389, 25 U.S.C. 348; 25 Stat. 891). These statutory provisions had the effect, insofar as allotted lands were concerned, of preempting the inherent right of an Indian tribe to regulate the descent and distribution of the property of its members. *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899). See F. Cohen, *Handbook of Federal Indian Law* 139 (1942). In Section 1 of the Act of June 25, 1910, ch. 431, 36 Stat. 855, Congress directed the Secretary of the Interior to ascertain the heirs of a person for whom an allotment is held in trust. 25 U.S.C. 372. In Section 2 of the same Act, Congress also authorized any person age 21 or older who has an interest in a trust or restricted allotment or other property held in trust by the United States to dispose of such property by will, in accordance with regulations prescribed by the Secretary of the Interior. 25 U.S.C. 373. As a matter of practice under these statutory provisions, when the original allottee died, each of his heirs or devisees received an undivided fractional interest in the whole allotment. Each such fractional interest in turn was further subdivided upon the death of the heir or devisee who owned it. As a result, after several generations, ownership of individual allotments often became extremely fragmented.

The problems associated with this trend were explored at least as early as 1928, in the Meriam Report [1] and by Felix Cohen in 1942 in his *Handbook on Federal Indian Law* (F. Cohen, *supra,* at 229-230). Comprehensive studies of the problem were conducted again in 1960 by the responsible committees in both the House and Senate.[2]

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[1] L. Meriam, Institute for Government Research, *The Problems of Indian Administration* 40-41. (1928).

[2] Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960); House

See generally S. Rep. 98-632, 98th Cong., 2d Sess. 3 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 712-719 (1971) [hereinafter cited as *Too Little Land*]. By 1960, one-half of the approximately 12 million acres of trust or restricted allotments was held by more than one heir, and one-half of that total in turn was held by more than six heirs. There were numerous examples in which 20 or 30 heirs held undivided interests in a single tract, and instances of more than 100 co-owners were not unheard-of. See S. Rep. 98-632, *supra*, at 3; *Too Little Land* 712; *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 13-14 (1966) [hereinafter cited as *1966 Hearings*].

In 1984, the Senate Select Committee on Indian Affairs summarized the consequences of this land ownership pattern (S. Rep. 98-632, *supra*, at 3):

> [T]he consequences of this fractionation are (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indians or non-member Indians, (6) inability to control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

In addition, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts

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Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960).

are left in a state of quasi-abandonment because of difficulties experienced by the Bureau of Indian Affairs (BIA) in obtaining agreement of the owners to lease the land. H.R. Rep. 97-908, 97th Cong., 2d Sess. 10-11, 13 (1982).

By the same token, from the BIA's perspective, the fractionated ownership creates substantial administrative problems by increasing the number of recordings required to maintain official land records, the number of probate proceedings to be examined in determining current title status, and the amount of work involved in responding to inquiries concering family histories in connection with the ownership of undivided interests. S. Rep. 98-632, *supra*, at 3. The computation of large common fractions for determining the ownership of undivided interests also has become far more complicated. *Ibid.* Indeed, the cost of maintaining such records often far exceeds the income realized from the fractional interest. See F. Cohen, *supra*, at 229; *1966 Hearings 12-16; Too Little Land* 718 n.42; *To Amend the Indian Land Consolidation Act of 1983: Hearings on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 6-8 (1984) [hereinafter cited as *1984 Hearings*].

B. **The Statutory Scheme**

1. Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 to address the problems discussed above that are created by the increasingly fractioned ownership of allotments in heirship status. As originally enacted, Section 207 provided that an undivided interest in trust or restricted land within a tribe's reservation or subject to its jurisdiction that represents 2% or less of the total acreage of the tract and has earned its owner less than $100 in the preceding year shall not descend by intestacy or devise, but instead shall escheat to the tribe. 25 U.S.C. 2206. The purpose of this provision was to address the extremes of the problem by preventing the

descent (and the resulting further fractionation of ownership) of interests in an allotment that already were "so small as to be financially meaningless" (H.R. Rep. 97-908, *supra*, at 11).

Section 207 does not, however, affect the rights of the owner of such a de minimis interest, during his lifetime, to receive his share of the income from the property or to exercise any other incidents of ownership, such as the right to use the land in a manner consistent with the rights of other owners of undivided interests in the tract. The Secretary's instructions concerning the implementation of Section 207 (see App., *infra*, 37a-40a) also make clear that the owner of an interest that would be subject to escheat upon his death may avoid that consequence by purchasing sufficient additional interests in the allotment from other co-owners so that his ownership share in the overall tract will exceed the 2% level. See 25 C.F.R. 151.7. Similarly, the owner of a de minimis interest subject to escheat may convey that interest to co-owners or to his relatives pursuant to 25 C.F.R. 152.25, while reserving a life estate for himself. This would enable the owner to retain the benefits of the tract during his lifetime and to ensure that it will remain in individual ownership thereafter.[3] A further option, if feasible, would be for the owner to apply for partition of the tract in such a way as to increase his ownership share. See 25 C.F.R. 152.33. See App., *infra*, 39a-40a.

Moreover, Section 207 cannot be viewed in isolation. It is an integral part of a broader law that responds to a number of land ownership problems on Indian reservations. For example, Section 203 of the Act, 25 U.S.C. 2202, extends to non-IRA tribes the provisions of Section 5 of the IRA, 25 U.S.C. 465, which authorize the Secre-

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[3] Of course, if the transferee's total interests in the tract did not satisfy the 2% or $100 test upon *his* death, the transferee's interest would escheat to the tribe pursuant to 25 U.S.C. 2206, unless he took similar measures to avoid escheat.

tary to acquire interests in land through purchase, relinquishment, gift, exchange, or assignment for the purpose of providing land for Indians. Section 203 therefore enables the Secretary to consolidate tribal or individual landholdings. The Act also contains three sections that grant new powers to tribes, subject to Secretarial oversight, to address land ownership problems. Under Section 204, 25 U.S.C. 2203, a tribe is authorized to adopt a land consolidation program for the elimination of the checkerboard pattern of tribal lands and tribal ownership of fractional interests in reservation lands, and the Secretary thereafter must approve any land transactions that are consistent with that plan. Section 205, 25 U.S.C. 2204, authorizes a tribe to purchase (at fair market value and subject to certain exceptions) all of the interests in a tract of reservation land with the consent of the owners of more than 50% of the total interests in that tract. Finally, in order to stem the passage of previously allotted land into non-Indian ownership, Section 206 of the Act permits a tribe, with the approval of the Secretary, to adopt an ordinance providing that non-members of the tribe or non-Indians shall not be permitted to receive an interest in trust or restricted lands by devise or descent, subject to special protections for non-member or non-Indian spouses or children.[4]

2. In October 1984, Congress amended Section 207 as part of amendments intended to refine the operation of the Indian Land Consolidation Act in a number of respects. Pub. L. No. 95-608, 98 Stat. 3171 *et seq.*; App., *infra,* 32a-36a. The amendments to Section 207 provide still further alternatives to its escheat provisions.

First, Congress relaxed the provision for automatic escheat that had been based on the income derived only in the year prior to the owner's death. The amended version

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[4] The descriptions of Sections 204, 205 and 206 in the text reflect the 1984 amendments to those Sections made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, discussed *infra*..

of Section 207 instead provides that (i) an interest in an allotment will escheat to the tribe if it represents 2% or less of the total acreage and is incapable of earning $100 in any one of the five years *after* the decedent's death , and (ii) the failure of the interest to earn the decedent at least $100 in any one of the five years prior to his death gives rise to a rebuttable presumption that it is incapable of earning $100 in any one of the five years after his death. These changes were intended to account for the possibility that the income in the year immediately prior to the owner's death might have been abnormally low or that the receipt of little or no income did not accurately reflect the true value of the interest because the parcel contained valuable mineral or timber resources that were not exploited during the period in which income was measured. S. Rep. 98-632, *supra*, at 7, 12; *1984 Hearings* 8, 17, 20, 26, 32, 33, 74-78; *Amendments to the Indian Land Consolidation Act: Hearing on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 8, 29, 31, 37 (1983) [hereinafter cited as *1983 Hearings*].

Second, a new Subsection (b) provides that Section 207 does not prohibit the owner of an otherwise escheatable interest from devising that interest to any other owner of a fractional interest in the same tract. This exception serves the statutory goal of consolidation of fractional interests while at the same time permitting the owner of such an interest to ensure that it will remain in individual rather than tribal ownership. S. Rep. 98-632, *supra*, at 12. Third, a new Subsection (c) permits a tribe, with the approval of the Secretary, to adopt its own code to govern the disposition of interests that otherwise would be subject to escheat under Section 207, as long as the tribal code likewise accomplishes the purpose of preventing further descent or fractionation of escheatable interests. Such a tribal code might provide, for example, for an otherwise escheatable interest to descend by intestacy to another owner of a fractional interest in the same tract.

c. **The Proceedings In This Case**

1. a Appellees filed this suit on October 20, 1983, in the United States District Court for the District of South Dakota challenging the constitutionality of Section 207 of the Indian Land Consolidation Act on the ground that it resulted in a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. The named plaintiffs, appellees herein, are Mary Irving, Patrick Pumpkin Seed, and Elaine Bissonette, as guardian for five minor children of Geraldine Poor Bear Cross. The named plaintiffs alleged that they are the potential heirs or devisees of parents (or, in one instance, an uncle) who died possessed of interests in tracts on the Pine Ridge or Rosebud Reservation that were subject to escheat under Section 207. They also sought to represent a class of all heirs and potential heirs of persons who died possessed of lands subject to escheat pursuant to Section 207.

The district court held that Section 207 of the Act does not violate the Just Compensation Clause of the Fifth Amendment, and it accordingly denied appellees' motion for injunctive relief and denied as moot their motion for class certification (App., *infra,* 21a-26a). The district court explained that rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation; that nothing in the Constitution prohibits a legislature from limiting, conditioning, or even abolishing the power of testamentary disposition; and that an expectation of succession to the property of a living person, whether by intestacy or devise, does not vest until the death of that person (App., *infra,* 22a-23a). Thus, the district court concluded that until the time of the death of their parents or uncle, appellees had only a mere expectancy of heirship, which was subject to being altered by Congress at any time, and they therefore had no vested property rights. For this reason, in the court's view, Section 207 did not result in a taking of appellees' property in violation

of the Fifth Amendment. App., *infra,* 23a-25a. The district court also held that under the applicable standard of review enunciated by this Court in *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 85 (1977), Congress's treatment of the decedent Indians' undivided fractional interests in allotted lands was tied rationally to the fulfillment of Congress's unique obligation toward the Indians. App., *infra,* 24a-25a n.1.

2. The court of appeals reversed, holding Section 207 unconstitutional (App., *infra,* 1a-17a).

a. The court of appeals first acknowledged that "Congress may alter and condition rights that have not yet vested in individual Indians" (*id.* at 3a-4a, citing *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976), and *United States* v. *Jim,* 409 U.S. 80 (1972)) and that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause" (App., *infra,* 4a (footnote omitted)). The court therefore recognized that appellees could not claim that the mere interference with an expectancy of heirship resulted in a taking of any property rights that had become vested in them (*ibid.*).

The court also rejected two theories by which appellees contended that they had acquired such vested rights. First, the court found "disingenuous and excessively technical" (App., *infra,* 5a) appellees' contention that Congress's use of the word "escheat" indicated an intent not to affect property rights that they allegedly received instantaneously upon the death of the decedent (*id.* at 5a-7a). In the court of appeals' view, the "sensible reading of [Section 207] is that the 1966 Congress, exercising its power as sovereign to control disposition of property at death, declared a limited class of property rights incapable of so passing" (*id.* at 5a (footnote omitted)). In these circumstances, the court reasoned, Congress's use of the term "escheat" is consistent with its established definition of " '[a] reversion of property to the state in consequence of

a want of any individual *competent to inherit*' " (*id.* at 6a, quoting *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis supplied by the court)).

The court of appeals likewise rejected the notion that appellees gained some sort of vested interest through the language of the trust patents pursuant to which the United States originally allotted lands to individual Indians (App., *infra*, 7a-11a). Appellees relied on language of the Sioux allotment statute providing that the land would be held in trust for the allottee or, in the case of his decease, for "his heirs according to the law of the State or Territory where such land is located" (*id.* at 8a, quoting Act of Mar. 2, 1889, § 11, 25 Stat. 891). In the court's view, this language meant only that the trust status was to continue beyond the death of the original allottee, and it was not intended to grant a vested future interest in the heirs and subsequent generations of descendants of the original allottee (App., *infra*, 8a-9a). The court observed that to find such a vested future interest in the heirs of the original allottee and in their heirs would be inconsistent with the provision in the Sioux statute that state law (which is subject to change) was to govern the descent of an allotment by intestacy and with Congress's later recognition of a right in the owner of a trust or restricted allotment to devise his property to others (*id.* at 9a-10a, citing 25 U.S.C. 373, 464). Further, the court explained that creation of such a right would be inconsistent with the purpose of the allotment acts to convert Indian lands to the American system of individualized rather than tribal ownership (App., *infra*, 10a-11a).

b. Although the court of appeals held that Section 207 does not interfere with any vested rights of the *appellees*, the court nevertheless held that it does interfere with what the court of appeals found to be a vested right in the original *allottee* and his successors to pass the lands upon death (App., *infra*, 15a-17a). The court so held even though it acknowledged that appellees had not directly

rested their argument on any distinct right of their decedents. See *id.* at 12a-13a n.11. In the court of appeals' view, the Sioux allotment statute was in the nature of a bargain, under which the allottees received, inter alia, the right to control the disposition of their property in return for relinquishing their claims to tribal lands (*id.* at 16a). On this premise, the court held that governmental interference with that right would result in a taking of property, just as the Court held in *Choate* v. *Trapp*, 224 U.S. 665 (1912), that Congress's repeal of the tax exemption for an allotment during the initial trust period resulted in a taking (App., *infra*, 15a-16a). Because Section 207 does not provide for the payment of compensation to the estates of the decedents whose lands are subject to escheat, the court of appeals held that Section 207 violates the Just Compensation Clause of the Fifth Amendment. In addition, although none of the named appellees was affected by the amended version of Section 207, because the property in question escheated prior to the October 1984 amendments, the court of appeals, without further analysis, held that the amended version of Section 207 is unconstitutional as well (App., *infra*, 17a).

## THE QUESTIONS ARE SUBSTANTIAL

The court of appeals has held unconstitutional a provision of an Act of Congress that is intended to stem the ever-increasing fractionation of ownership that has inhibited the use and development of allotted lands and rendered the administration of Indian land and estates both complex and unduly expensive. The provision in Section 207 of the Indian Land Consolidation Act for the escheat to the tribe of certain de minimis interests in Indian allotments upon the death of the owner constitutes a reasonable exercise by Congress of the inherent sovereign power to regulate the descent and distribution of property and to specify the disposition of property for which there

are no heirs who qualify to receive it. This regulatory measure clearly furthers the United States' obligation to the Indians by providing for the gradual elimination of the most extreme aspects of the fractionated ownership problem, while at the same time retaining the interests affected in Indian ownership under the auspices of the tribe concerned. By the same token, Section 207 does not substantially interfere with private property rights. As the court of appeals recognized, the potential heirs of a person who owns a fractional undivided interest have no vested right to receive that interest, and Section 207 likewise does not interfere with the rights of the owner to retain such a fractional interest during his lifetime or to dispose of it to relatives or other owners of interests in the same tract.

The decision below also is of substantial practical importance. In excess of 4,000 interests escheated to the tribe concerned during the period of less than two years that the original version of Section 207 was in effect. Moreover, although the amended version of Section 207 did not apply to any of the interests held by appellees' decedents, the court of appeals invalidated the amended version as well. The result has been to prevent the distribution of property in affected estates of deceased Indians in the Eighth Circuit and to cast a cloud over the administration of such estates and interests of other Indians. Review by this Court is plainly warranted.

1. The court of appeals recognized but then disregarded the firmly established legal principles that govern this case. Congress has plenary authority over Indian affairs and property—particularly property held in trust by the United States or subject to restraints against alienation that long have characterized Indian tenure. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985); *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310-317 (1911); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903); *United States* v. *Kagama*, 118 U.S.

375, 379-385 (1886). See also *United States* v. *Sioux Nation*, 448 U.S. 371, 408, 414-415 (1980). Accordingly, the congressional authority to regulate the disposition of interests in property upon the death of the Indian owner encompasses whatever sovereign powers a State has over such matters, plus the unique prerogatives of Congress attributable to the special relationship of the United States to the Indians.

Section 207 of the Indian Land Consolidation Act is a valid exercise of Congress's plenary power in this regard. It is "nothing more than an exercise of the power, which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850). This Court long has recognized this sovereign power and the corresponding principle that the right to dispose of and acquire property upon the death of the owner is dependent upon governing law. See, *e.g.*, *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288-291 (1898); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896); *United States* v. *Fox*, 94 U.S. 315, 320-321 (1876); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.), 192, 202 (1825). Thus, the Court has stressed that a statute permitting a person to dispose of property by will is an enabling act, and that a person may not devise his property in the absence of such authorization. See, *e.g.*, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 289; *United States* v. *Perkins*, 163 U.S. at 627; *United States* v. *Fox*, 94 U.S. at 320.

Similarly, where the sovereign has provided for the descent of property to heirs designated by law, the potential heirs have no vested rights, prior to the death of the owner, to receive the property. As a result, the law govern-

ing intestate succession may be revised by the legislature, and the revised laws may be applied to particular property without contravening the Fifth Amendment, so long as it has not become vested in the heirs under prior law by virtue of the death of the owner. See generally 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199, 201, § 2406, at 208-209, 211 (J. Grimes ed. 1979).

These principles were summarized by the Court in *Irying Trust Co.* v. *Day,* 314 U.S. at 562 (citations omitted):

> Rights of succession to the property of a deceased, whether by will or intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.

The Court has applied the same rules to descent and distribution of Indian property, recognizing the power of Congress to amend the governing law as to an interest in an allotment that has not already passed to the heirs of the owner. See *Jefferson* v. *Fink,* 247 U.S. 288, 294 (1918). See also *Simmons* v. *Eagle Seelatsee,* 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966). And, indeed, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal law that is itself subject to change. See, *e.g.*, 25 U.S.C. 372, 464, 2205; *Jefferson* v. *Fink, supra; Simmons* v. *Eagle Seelatsee, supra.*

b. There is no need here to consider the limits of the foregoing principles or their application to a statute that declares the state or federal government to be the heir to

everyone as to all property within its juridiction. Compare *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288-289. Section 207 of the Indian Land Consolidation Act is a carefully tailored measure that falls well within whatever limits the Fifth Amendment might be thought to impose on such a regulatory statute to ensure that it is not an unconstitutional taking of private property. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-126 (1978). A number of factors support this conclusion.

First, Congress has not imposed a blanket prohibition against the passing of *all* interests in trust or restricted allotments by intestacy or devise. Section 207 applies only to what Congress reasonably determined to be de minimis undivided fractional interests in such allotments: those that represent less than 2% of the tract and that earned the owner less than $100 in the preceding year (or, under the amended version, are incapable of earning $100 annually). More substantial interests may continue to pass to devisees by will or to heirs in accordance with state law, just as they did before. Thus, as a general matter, Section 207 imposes only a marginal limitation on the ability of Indians to dispose of or receive interests in allotments.

Second, Section 207 serves significant public purposes by addressing the problems associated with the increasingly fractionated ownership of Indian allotments. As we have explained above, that pattern of land ownership has greatly complicated the leasing or other use of such tracts, often preventing their most economic use; devalued the undivided interests because of the practical difficulties associated with use or sale of the land; greatly attenuated the relationship of the numerous individual owners to the land itself; and created substantial and costly administrative difficulties for the BIA in administering the land and the estates of deceased Indians. Section 207 is

directed to the category of cases in which Congress determined that these problems are present in their most extreme form because of the presence of the most fractionated ownership.

Third, and in a related vein, the impact on the ability of an Indian or his heirs or devisees to pass or receive an interest in the allotment is not the incidental and unfair consequence of a regulatory measure directed to other purposes. The fractionated ownership is itself the cause of the problem that Congress sought to remedy, because the existence of a de minimis ownership interest has adverse effects on other owners of the property and on the reservation community as a whole. A legislature has particular authority to address and eliminate such adverse consequences to other property owners. *Penn Central,* 438 U.S. at 125-127. See, *e.g., Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).

Fourth, Congress did not provide that the de minimis interests involved would escheat to the United States; they instead pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. This factor is significant for several reasons. In most cases, the tribe itself was the owner of the land prior to the allotment, and Section 207 has the effect in those circumstances of returning property to the original owner. When Congress formally abandoned the allotment policy in 1934, it sought to return the tribes and their reservations to their prior status to the degree possible by restoring surplus land to tribal ownership, providing for the consolidation of tribal lands, barring further allotments, and retaining existing allotments in trust or restricted status. See page 4, *supra.* Section 207 therefore is consistent with and furthers the policies of the IRA that have governed Indian land ownership on reservations for more than 50 years. Moreover, the fact that the interest does not pass to the United States serves to distinguish Section 207

from statutes that constitute a direct invasion of the property by the enacting government. This feature thus reinforces the role of Section 207 as a regulatory measure intended to adjust benefits and burdens in order to promote the common good of those in the community of the Indian reservation generally. See *Penn Central,* 438 U.S. at 124. The retention of the land in Indian ownership also serves to ensure that the measure is in furtherance of the United States' special relationship to the Indians, and not an act of expropriation by the government directed to other ends. Compare *United States* v. *Sioux Nation,* 448 U.S. at 414-417.

Fifth, the Indian tribe to which the property passes has a special responsibility for its members and their families and for the land within its jurisdiction, and the members in turn have a special bond among themselves through the tribe and collectively own a beneficial interest in tribal property, including property that escheats pursuant to 25 U.S.C. 2206. The escheat to the tribe of a de minimis interest in an allotment owned by a tribal member therefore does not entirely sever the nexus of that member or his potential heirs to the property. It also is significant that Section 207 applies uniformly to all undivided interests that represent less than 2% of the total acreage and do not satisfy the $100 income test. Although the escheat of any particular parcel might adversely affect the deceased owner of that parcel or his potential heirs or devisees, those potential heirs and devisees, if they retain a nexus to the tribe or the reservation, presumably stand to benefit in some measure by the escheat of other interests to the tribe. As a result there is some "reciprocity of advantage" that undermines any taking argument in this setting. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922); *Penn Central,* 438 U.S. at 139-140 (Rehnquist, J., dissenting).

Sixth, from the perspective of the owner of a fractional interest in a trust or restricted allotment, it is significant that Section 207 affects only one of the incidents of owner-

ship: the ability to dispose of the property at death. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard,* 444 U.S. 51, 65-66 (1979). In *Allard,* the owner was barred from selling the particular property but could retain, donate, or devise it. The Court held that the restriction on this one means of disposing of the property did not constitute a taking. *Id.* at 66-68. In this case, under the original version of Section 207, the owner of a de minimus fractional interest in an allotment likewise retained his full right to all the incidents of ownership and was deprived of only one means of disposing of it—by intestacy or devise upon his death. The owner still could dispose of the interest during his lifetime by selling it to other owners of an interest in the same parcel, by exchanging it for another interest of equal value, or by donating it to a relative. 25 C.F.R. 152.25. Similarly, he could acquire an additonal interest in the tract in order to avoid escheat. 25 C.F.R. 151.7. And, in appropriate circumstances, he could apply for partition of the parcel in kind. 25 C.F.R. 152.33. Moreover, under the amended version of Section 207, an owner may dispose of an otherwise escheatable interest even by devise, provided that the devise is made to another owner of an interest in the same property. Accordingly here, as in *Andrus* v. *Allard, supra,* the statute does not significantly interfere with the incidents of ownership viewed in the aggregate.

Finally, Section 207 does not undermine distinct investment-backed expectations. See *Penn Central,* 438 U.S. at 124. As explained above, a potential heir or devisee has no legally protected vested right in the property, and his bare expectancy of receiving the property is not protected by the Fifth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 161 (1980). Nor is it likely that the deceased owner of the fractional interest would have made an investment in the property in

anticipation of passing that interest. In most cases, the interest presumably passed to him by intestacy or devise, and in light of its insubstantial nature, his only association with it probably would have been the receipt of a share of its income. Moreover, even during the owner's lifetime, the interest was held subject to restraints that required the consent of the federal government for any alienation. Congress retained the right to alter these restrictions during the trust period in furtherance of its plenary control over Indian property (see, *e.g.*, *Tiger* v. *Western Investment Co.*, 221 U.S. at 316), or to alter the rules governing the distribution of the property at death (*Jefferson* v. *Fink*, 247 U.S. at 294)—circumstances that further diminished any expectation of an unqualified right to dispose of even de minimis interests at death.

The foregoing factors sufficiently demonstrate that Section 207 constitutes a reasonable exercise by Congress of the established sovereign power to establish reasonable rules for the distribution of property upon the death of the owner and does not, in the present circumstances, constitute a taking of property requiring the payment of compensation.[5]

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[5] We agree with the court of appeals (App., *infra*, 17a) that compensation is not available from the United States for any taking that might have occurred. Section 207 itself does not provide for such compensation, and the legislative history is replete with references to the absence of compensation and the intention that the Act would not result in any cost to the United States. H.R. Rep. 97-908, *supra*, at 11; S. Rep. 98-632, *supra*, at 8; *1984 Hearings* 19, 20, 23, 30-31, 33, 34, 35, 37, 38, 39, 40, 42, 46, 57, 76; *1983 Hearings* 21, 38. Compare 25 U.S.C. 2205 (3). Moreover, the legislative history of the 1984 amendments reflects an awareness of the district court's holding in this case that Section 207 did not effect a taking of vested property rights. S. Rep. 98-632, *supra*, at 5; *1984 Hearings* 26, 76. Against this background, we do not believe that Congress intended that compensation nevertheless should be available in a suit against the United States under the Tucker Act. Compare *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28-30.

c. The court of appeals did not disagree as a general matter with the governing principles, discussed above. In fact, it expressly concurred in the view that potential heirs or devises such as appellees have no vested interest in the receipt of property of a living person that is protected by the Fifth Amendment against intervening changes in the law (App., *infra,* 4a). The court of appeals also correctly held that appellees acquired no such vested rights under the Sioux allotment statute (*id.* at 11a). Instead, although the court appeared to recognize that appellee did not so argue (*id.* at 12a-13a n.11), the court held that "the *decedents* in this case had vested rights in being able to control the disposition of their property at death" (*id.* at 15a (emphasis added)), and that the effect of Section 207 on that right violated the Fifth Amendment (App., *infra,* 16a-17a). The court believed that the provision in the Sioux allotment statute for state law to govern inheritance reflected a bargain under which the individual Sioux obtained a right to dispose of the property at death in return for giving up their interests in tribal lands. This analysis is seriously flawed.

As an initial matter, the court of appeals' notion that the original Sioux allottees or their descendants obtained a vested right to control the distribution of their interests in the allotment at death is refuted by the text of the Sioux statute itself. Section 11 of that act provides that the land will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located." The term "heirs" as used in this Section plainly refers to the allottee's heirs under the state law of intestate succession. See F Cohen, *supra,* at 230-231. It was not until the Act of June 25, 1910 that an Indian could dispose of his interest in a trust allotment by will. See *id.* at 231-232; *Blanset* v. *Cardin,* 256 U.S. 319, 323-327 (1921).

In any event, the court of appeals was clearly wrong in construing the Sioux allotment statute as a form of contract in which Congress conferred on individual allottees

and every succeeding generation of their descendants a permanent and vested right to be exempt from whatever amendments the legislature might adopt to govern the distribution of a decedent's property. This Court has recently reaffirmed the established principle that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declare a policy to be pursued until the legislature shall ordain otherwise.' " *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14, quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). Nothing in Section 11 of the Sioux allotment statute suggests, much less clearly indicates, that Congress conferred on Indian allottees and succeeding generations of their descendants such a vested right. To the contrary, Section 11 provides that the allotment would descend in conformity with state law, which was itself subject to change, as the court of appeals acknowledged (App., *infra*, 9a n.9).

Moreover, in *Jefferson* v. *Fink*, *supra*, this Court applied the principle that statutes do not create vested rights in the very context of the inheritance of Indian allotments. There, the Court rejected the argument that Congress's specification in a particular allotment statute that descent of allotments would be governed by Arkansas law did not create a vested or contractual right to have that law applied, and that Congress could later provide for another disposition of the property of a deceased allottee. 247 U.S. at 293-294. The Court relied in part on the language in Section 5 of the General Allotment Act providing for the allotment to continue to be held in trust for the original allottee's heirs according to state law (247 U.S. at 290). Because the relevant language in Section 11 of the Sioux allotment statute is identical to that in Section 5 of the

General Allotment Act, there likewise is no reason to believe that Congress intended to confer on the Sioux allottees a vested right to be exempt from future statutory changes affecting the distribution of property.

Finally, even if some right to pass an allotment at death was originally contemplated, that right cannot be thought to have been of permanent effect (compare *Choate* v. *Trapp*, 224 U.S. 665 (1912)) and to vest absolutely in each succeeding generation of the allottee's descendants, irrespective of intervening events and the pressing circumstances occasioned by the extreme fragmentation of ownership. It is far more likely that Congress would have intended an interest in an allotment to be subject to the reserved sovereign power to adopt reasonable rules, such as those in Section 207, to govern the descent and distribution of property.

2. The court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. App., *infra*, 17a. The court did so even though all of the interests of the decedents in this case escheated pursuant to the original version of Section 207 (see App., *infra*, 3a). And the court also did so without discussing any features of the latter provision—such as the new Subsection (b), which permits the owner of an otherwise escheatable interest to devise it to another owner of an interest in the same tract—that even more clearly establish that Section 207 does not impermissibly interfere with a supposed right to dispose of property at death.

Because there was no case or controversy regarding the application of the amended Section 207 to the parties before the court of appeals, that court had no authority to invalidate that provision as well. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980). Accordingly, if this Court ultimately should affirm the judgment below insofar as it invalidates

the original version of Section 207, the Court should vacate that judgment insofar as it invalidates the amended version of Section 207.

3. The questions presented are of substantial practical importance. We have been informed by the Department of the Interior that approximately 4,430 property interests escheated to the tribes concerned during the period that the original version of Section 207 was in effect. Moreover, in light of the decision of the court of appeals, the Department of the Interior has found it necessary to order that no final distribution be made of property in affected probate proceedings in the Eighth Circuit pending this Court's decision, and a cloud has been cast over probate proceedings elsewhere as well.[6] In addition, if the judgment of the court of appeals is permitted to stand, the result will be a return to the increasingly fractionated ownership of Indian allotments that gave rise to the passage of Section 207. Review by this Court therefore is clearly warranted.

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[6] A similar suit challenging Section 207 has been filed by enrolled members of the Nez Perce Tribe. *Marsh* v. *Hodel*, No. 85-3099 (D. Idaho.)

## CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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OCTOBER 1985

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 84-1094

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISSONETTE AS GUARDIAN FOR DUANE CROSS, MIGUEL CROSS, HOPE CROSS, ANTHONY CROSS, FAITH CROSS, AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

*v.*

WILLIAM P. CLARK, SECRETARY, DEPARTMENT OF INTERIOR AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, APPELLEES

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Appeal from the United States District Court for the District of South Dakota

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Submitted: October 8, 1984
Filed: March 29, 1985

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Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

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JOHN R. GIBSON, Circuit Judge.

The issue before us is the constitutionality of 25 U.S.C. § 2206 (1982),[1] which provides that de minimis shares of

[1] This statute has been amended since oral arguments were heard in this case, Act of Oct. 30, 1984, Pub. L. No. 98-609 (H.R.J. Res. 158), 98 Stat. 3171, 3173, but its operation as challenged here is unaffected and the parties have not suggested that any of the changes put the plaintiffs outside the provision's coverage.

land allotted in trust to individual members of the Oglala Sioux Tribe may not pass by intestacy or devise but instead escheat to that tribe. The designated heirs and devisees of three deceased tribe members argue that this statute deprives them of property without just compensation in violation of the fifth amendment. The district court found the provision constitutional. We reverse.

The lands at issue in this case were allotted to individual members of the Oglala Sioux Tribe, to be held in trust for those individuals by the United States, pursuant to congressional Indian land policies of the late 1800's and early 1900's. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888.[2] These and subsequent policies, however, resulted in the lands frequently being jointly owned by such large numbers of individuals with undivided fractional interests that the tracts could not be made productive. In an attempt to alleviate this problem, Congress in 1983 enacted the Indian Land Consolidation Act, Pub. L. No. 97-459, tit. II, 96 Stat. 2515, 2517 (1983), 25 U.S.C. §§ 2201-2210 (1982) (amended by Act of Oct. 30, 1984, Pub. L. No. 98-608, 98 Stat. 3171). *See* H.R. Rep. No. 908, 97th Cong., 2d Sess. 13, *reprinted in* 1982 U.S. Code Cong. & Ad. News 4415, 4422-23; S. Rep. No. 632, 98th Cong., 2d Sess. 2-3, 10-11 (1984); *see generally Too Little Land, Too Many Heirs—The Indian Heirship Land Problem,* 46 Wash. L. Rev. 709 (1971). This Act includes a provision aimed at reducing further multiplication of ownership upon the death of current interest-holders:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic] by intestacy or devise but shall escheat to that

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[2] This Act applied to the former Great Sioux Reservation the land distribution system authorized by the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1982)).

> tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

25 U.S.C. § 2206 (as originally enacted).

Mary Irving, Patrick Pumpkin Seed, and Duane, Miguel, Hope, Anthony, and Faith Cross (hereafter "Irving"), members of the Oglala Sioux Tribe, all had parents or uncles as to whom they were potential heirs or named devisees die within six months after the Indian Land Consolidation Act was passed. Upon receiving notice that a hearing had been scheduled for the week of October 24, 1983, to determine if the Oglala Tribe had a right through escheat to any lands of her decedent that might otherwise have passed to her, Irving filed this suit in district court. Her complaint requested preliminary and permanent injunctions against enforcement by the Department of Interior of section 2206 with a declaratory judgment that the provision was unconstitutional as authorizing seizure of her property without the just compensation required by the fifth amendment. The district court restrained the government from proceeding under the escheat provision for a time but then consolidated the preliminary and permanent injunction issues and denied relief, holding that Irving had only an expectancy of heirship, which could be altered by intervening legislation, and not a vested property right, which would have been entitled to constitutional protection.

It is clear that the vested property rights of individual Indians are "secured and enforced to the same extent and in the same way" as the equivalent rights of other citizens. *Choate* v. *Trapp*, 224 U.S. 665, 677 (1912); *see Morrow* v. *United States*, 243 F. 854 (8th Cir. 1917). It is also clear, however, that Congress may alter and condition rights that have not yet vested in individual Indians, *see Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976);

*United States* v. *Jim*, 409 U.S. 80 (1972) (per curiam), and that the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause.[3] 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199 (J. Grimes ed. 1979); *id.* § 2406, at 211; *id.* § 2411, at 240; *see also Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918); *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966). *Cf.* L. Simes & A. Smith, *The Law of Future Interests* § 1, at 3-4 (2d ed. 1956) (possibility of taking property by inheritance or devise does not constitute "future interest" because the prospective taker is not considered to have any part of the present ownership interest). Irving on appeal thus asserts two theories by which she allegedly acquired fifth amendment rights in the questioned lands in her decedent's estate—first, that her interest vested upon the death of her ancestor while the escheat provision could operate only subsequent to that time; and second, that the language of the initial allotments of Indian land to Oglala tribe members around 1900 created vested interests in potential heirs, including her, under the common law or as a matter of contract.

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[3] Apparently, no case has ever addressed an attempt by a sovereign to completely abolish inheritance and require that certain property escheat at death. Because of the sovereign's power over the order of succession, however, any possibility that total abrogation of inheritance might be impermissible does not alter the conclusion that no particular individual potential heir has a *vested right*, which is the issue with which we are concerned. Claims thus for protection against taking of *property* under the fifth amendment are to be distinguished from substantive due process or equal protection allegations which potential heirs might choose to raise. Also, abrogation of inheritance might more properly be seen as implicating a right of the *deceased* to pass his property. *CF. infra* section III.

I.

Irving's first argument relies on a disingenuous and excessively technical construction of certain words in section 2206, "Escheat," Irving reasons, denotes the operation by which the government acquires the right to an estate left vacant because the possessor has died intestate without heirs. Therefore, when heirs exist, their rights vest instantly at death, before the state can take any interest, and the use of the term "escheat" in section 2206 is a "subterfuge" for the taking without compensation of Irving's already vested property rights.

The statute, however, on its face contemplates the existence of heirs or even devisees, and Congress earlier had already provided that certain Indian lands were to escheat to the tribe, as opposed to the state or federal government, when the possessor died without heirs. 25 U.S.C. § 373a (1982). "Escheat," then, seemingly was not intended to have in section 2206 the limited meaning ascribed to it by Irving. A statute should be construed to make sense, *see Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 575 (1982), and so as to support, rather than defeat, its constitutionality. *Crowell* v. *Benson,* 285 U.S. 22, 46 (1932). The sensible reading of section 2206 is that Congress, exercising its power as sovereign[4] to control disposition of property at death, declared a limited class of property rights incapable of so passing. *See Irving Trust Co.* v. *Day,* 314 U.S. 556, 562 (1942); *Mager* v. *Grima,* 49 U.S. (8 How.) 490 (1850); 5 G. Thompson, *supra,* § 2406, at 212; 5A G. Thompson, *Commentaries on the Modern Law of Real Property* § 2607, at 354 (J. Grimes ed. 1978). Thus, no in-

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[4] The power of Congress over Indians has been characterized as similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves. *Felix S. Cohen's Handbook of Federal Indian Law* 219-20 (1982 ed.). Congress's Indian powers thus are comparable to those of state governments in their respective realms.

terest within the purview of the statute could ever have vested in Irving.

This interpretation is supported by a comparison of the language of section 2206 with that of the immediately preceding section of the Indian Land Consolidation Act, 25 U.S.C. § 2205, as originally enacted. Section 2206 commands that no Indian lands within its purview "shall descedent [sic] by intestacy or devise"; section 2205 in contrast provides that, upon appropriate action by a given tribe, nonmembers of that tribe and non-Indians "shall not be entitled *to receive* by devise or descent" (emphasis added) any interest in allotted individual trust land. Congress in the legislative history expressly stated that section 2205 was not intended as a restriction on the testamentary power of Indians and that interests were to pass according to will if the tribe did not exercise its right to acquire the land by paying fair market value. H.R. Rep. 908, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. Code Cong. & Ad. News 4415, 4418; *see also* 25 U.S.C. § 2205(3). Given the differing language and the failure in section 2206 to provide for compensation, it is fair to infer that Congress in that section, in contrast to its intent in section 2205, did presume to limit the power of disposition at death as to certain lands.[5]

Such an interpretation further is not inconsistent with the presence of the term "escheat," which, to use the definition cited by Irving, is "[a] reversion of property to the state in consequence of a want of any individual *competent to inherit.*" *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis added). Irving limits the meaning of "any individual competent to inherit" to "heirs"; but since "heirs" themselves are identified and ordered by the sover-

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[5] For other sections that, like section 2205, give effect to the decedent's intent but then under certain circumstances replace an heir's or devisee's interest in land with monetary compensation, see 25 U.S.C. §§ 272, 273 (1982).

eign, 5 G. Thompson, *supra,* § 2405, at 202, 240,[6] there seems no reason why the sovereign could not use the terminology "escheat" in purporting to make parties incompetent to inherit for reasons other than lack of a sufficient degree of relationship. "Escheat" historically was used to refer to the operation by which a sovereign acquired title to land due to, for example, the possessor's misconduct, as well as upon death without heirs. *Id.* § 2510, at 464-65. The term now may encompass the passing to the sovereign of land that has been abandoned or as to which the owner is missing or which is illegally held by a corporation. *Id.* § 2511, at 474.[7] Thus, the use of "escheat" is actually most consistent not with Irving's interpretation that section 2206 takes land already vested in Indian heirs and devisees but with the interpretation that the government has deemed that no person shall be "competent" to inherit certain de minimis interests in land. Affected de minimis interests thus could never vest in purported heirs and devisees and did not vest in Irving here so that she has no property right protectible under the fifth amendment taking clause.

II.

In the alternative, Irving argues that she gained some sort of vested future interest in the land of her decedent through the language of the trust patents pursuant to which the United States originally allotted lands to individual Indians. The Oglala Sioux patents were to declare

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[6] One commentator has indeed observed a "noticeable trend in the statutes to increase the possibility of the state being an heir by limiting the circle of partiable inheritance." 5 G. Thompson, *supra,* § 2411, at 240.

[7] The language in additional passages in 5 *Thompson* further suggests that "escheat" may lossely, if not technically, be used to refer to any circumstance in which the sovereign takes title to property. *See* 5 G. Thompson, *supra,* § 2510, at 463; *id.* § 2514, at 482.

> that the United States does and will hold the lands thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located * * * *Provided further,* That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto * * *.

Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891.

Initially we point out that, contrary to the manner in which the Irving cited this passage in her brief, the "heirs" language appears only in the context of identifying beneficiaries of the trusts and not in conjunction with grants of interests to individual Indians; the term may function merely to indicate that the trust status of the lands was to continue upon the death of holders of equitable interests.[8] Further, since we have no evidence that Irving's decedent was an original allottee, she cannot claim a vested right by construing the patents as creating life estates in the allottees: the remainders would then vest *fees* in the first generation of heirs and would not pass rights to the allottees' future decedents. Creation of a fee tail generally requires an express reference, absent here, to heirs "of his body" or other words of procreation, 4 G. Thompson, *Commentaries on the Modern Law of Real Property* § 1866, at 483 (J. Grimes ed. 1979), and such an estate also would not create a vested interest in Irving because heirs apparent in tail again have only expectancies. L. Simes & S. Smith, *supra,* § 398. Irving, rather, seems to be relying either on an ancient common law theory that land was actually owned by families rather than individuals such that heirs had property rights which

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[8] For example, regulations provide that a non-Indian to whom allotted lands pass is entitled to a patent in fee rather than in trust. 25 C.F.R. § 152.6 (1983).

could not be defeated by alienation without their consent, *see* 5 G. Thompson, *supra,* § 2406, at 206-08; *id.* § 2410, at 234, or, as clarified in her reply brief, on the maxim that enactments should be construed in favor of and as they would have been understood by the Indians, *Choate* v. *Trapp,* 224 U.S. 665, 675-77 (1912); *Antoine* v. *United States,* 637 F.2d 1177, 1179-80 (8th Cir. 1981), particularly when, as here, the statute is in the nature of a treaty or contract and would not have taken effect absent approval by the tribe. *See* Act of Mar. 2, 1889, ch. 405, § 28, 25 Stat. 888, 899.

All these theories are subject to several objections. First, the existence of any vested right in an allottee's heirs would mean that an Indian to whom the land was allotted would have no power to dispose of that property by will. Subsequent enactments of Congress, however, assume such a power of devise and presume to oversee and condition it. *E.g.,* 25 U.S.C. §§ 373, 464 (1982). Irving does not even seem to recognize the implications of her argument as to these statutes; in fact, certain of her fellow plaintiffs are actually claiming under a will rather than as intestate heirs. *Cf.* L. Simes & A. Smith, *supra,* § 403, at 433 (courts' concern with finding vested rights in potential heirs and devisees springs in part from the intolerable interference with owner control over property that thus would be allowed).

Second, the language of the allotment act pursuant to which the Oglala Sioux took their individual trust patents expressly provides that state law as to intestate succession shall control. Such a reference would be unnecessary if the allotment by its terms had already created vested rights in certain heirs.[9] Finally, we point out that Congress, when it

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[9] We further reject any argument that this clause functioned to vest rights in those individuals who would have been heirs under the law of the applicable state at the time of allotment, thus protecting their expectancies from changes in state as well as federal law. *See Jefferson* v. *Fink,* 247 U.S. 288 (1918).

has so intended, has made clear in its statutes that lands allotted in trust to individual Indians were to pass to those individuals' heirs. *E.g.*, Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500, 503 ("The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will * * *."); Act of Feb. 6, 1871, ch. 38, § 8, 16 Stat. 404, 407 ("[T]he lands assigned and allotted as aforesaid shall be held inalienable, and in case of the death of any person, his or her right thereto shall descend to his or her heirs * * *."); *cf.* Treaty with the Omahas, Mar. 16, 1854, art. 6, 10 Stat. 1043, 1044 (The President "may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home"); Treaty with the Ottoes & Missourias, Mar. 15, 1854, art. 6, 10 Stat. 1038, 1039 (identical language except "secure" used in place of "insure").

These considerations are equally relevant to the argument that the allotments should be read as the Indians would have understood them. Highly malleable rules of statutory construction must have some limit, and the Supreme Court has also stated that "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.' " *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). A conclusion that a trust patent vested rights in an Indian's heirs would be contrary to the recognized purpose of the allotment scheme of converting Indians to the American system of individualized, as opposed to tribal, land ownership, *see Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973); *Felix S. Cohen's Handbook of Federal Indian Law* 128-32 (1982 ed.), a system which of course is character-

ized not by common law concepts of family title but generally by the right of devise. The legislative history cited by plaintiffs, S. Exec. Doc. No. 51, 51st Cong., 1st Sess. (1890), *found in* Serial Set 2682, is not to the contrary. Any emphasis that lands allotted to individual Indians could not be taken from them and their children does not necessarily lead to the conclusion that the parties intended to vest rights in those allottees' heirs; the record is equally consistent with the idea that the lands were to be protected from future interference or diminution *by the government* but that the individual Indians themselves, subject to safeguards against trickery by white settlers, could control whether their lands passed to their heirs.[10]

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[10] Senate Executive Document No. 51 is the report of the Commission sent to the Sioux territories to obtain the approval of the various tribes, as necessary before the allotment statute at issue here could take effect. *See* Act of Mar. 2, 1889, ch. 405, § 28, 25 Stat. 888, 899. Irving quotes from the appendix, exhibit c, which is the diary kept by the Commission during its travels. The following passages are representative of the material in her brief:

> The great trouble with the other treaties was that they did not give the Indians patents for their land, and now this treaty gives you papers for your land, that nobody can take away from you. [Applause.] Your taking a patent for it takes it out of Congress, and they can't make any change in it.

S. Exec. Doc. No. 51, *supra*, at 54 (Gen. Crook at the Rosebud Agency, Dakota, June 7, 1889).

> And if you take your land in severalty a deed is given to you by the Great Father, and he holds it in trust for you for twenty-five years, so that you cannot be traded or cheated out of it, so that it will remain for you and your children and your children's children.

*Id.* at 73 (Gen. Warner at the Pine Ridge Agency, Dakota, June 15, 1889).

> When you get a deed for your land nobody can take it away from you or your children afterwards. As long as you keep it in common as you do now you are liable to be legislated out of it just as you have been in the past.

## III.

This is not to say that the legislative history cited by Irving and the treaty/contract nature of the Sioux allotment act are of no consequence to any consideration of section 2206. As we implied (and footnote 10, *supra,* illustrates), the Indians clearly had a concern with retaining possession of their land in the face of possible future governmental interference, of which the escheat statute here might be an example. Thus, while potential heirs and devisees took no vested rights,,protectible interests within the contemplation of the fifth amendment might still exist in the original allotees themselves and in successors, such as Irving's decedent, to whom land had actually passed prior to the enactment of section 2206. We must first decide, however, if Irving should be granted standing to raise such third-party rights.[11]

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*Id.* at 85 (Gen. Crook at the Pine Ridge Agency, Dakota, June 17, 1889).

The references to heirs and children in conjunction with land actually seem to be relatively sparse given the nearly 200 pages of diary. The dialogue between the Indians and the Commission centered more on whether the government would live up to obligations assumed in this and previous treaties (i.e., Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635), particularly in regard to providing education to Indian children and supplying agricultural implements and seeds and clothing and food rations. The general emphasis was that conversion to "white man's ways" and system of individual land ownership with the anticipated achievement of Indian self-sufficiency would promote the best life and the best future for the Indians' children, not that the treaty would vest specific rights to Indian lands in heirs in perpetuity: "All I can say now is, when I am laying on my death-bed, if you do not defeat this bill, I will have the satisfaction of knowing that I *can leave* a piece of land to my children * * *." S. Exec. Doc. No. 51, *supra,* at 113 (American Horse at the Pine Ridge Agency, Dakota, June 21, 1889) (emphasis added).

[11] There may be some question as to whether the third-party rights of decedents were raised sufficiently on their merits to justify our attention here. Irving's brief, however, in at least two places appears to

A.

While "[o]rdinarily, one may not claim standing * * * to vindicate the constitutional rights of some third party," *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953), that requirement is not jurisdictional[12] but is "only a rule of practice" which may be "outweighed by the need to protect the fundamental rights which would be denied." *Id.* at 275. The Supreme Court has suggested two factors to be considered in determining when the third-party rule should be suspended: the relationship of the litigant to the person whose right he seeks to assert, and the ability of the third party to assert his own right. *Singleton* v. *Wulff,* 428 U.S. 106, 114-16 (1976); *see Gold Cross Ambulance & Transfer* v. *City of Kansas City,* 705 F.2d 1005, 1016 (8th Cir. 1983), *petition for cert. filed,* 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138).[13]

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be arguing her decedent's rights (p. xii—"The Appellants also urge that the Court clearly limit the power of Appellees, as the sovereign, to extinguish the title to the *decedent's property* * * * the Appellees' argument that [the sovereign's power] includes the right to extinguish *interests of the decedent* * * * points * * * too broadly" (emphasis added); p. 19—"The Court did not hold * * * that the State of New York had or was entitled to extinguish the *decedent's interest in his property* * * * (emphasis added)). In addition, the third-party argument follows from Irving's assertions that the allotment statute was in the nature of a treaty or contract except that this theory looks to rights vested in a different party (the distinction between decedents' and heirs' rights in this context might even seem overly technical to some). We thus feel comfortable in deciding the case on this basis.

[12] Standing to raise third-party rights, or jus tertii, thus is to be distinguished from "injury in fact" standing, which is mandated by the case or controversy requirement of article III of the Constitution and which is jurisdictional. *Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976). Irving clearly has standing in the latter sense; the injury of loss of property (though not of a vested right to property) is sufficiently concrete since the ancestor through whom Irving claims has died intestate and we know Irving would have taken absent the operation of section 2206.

[13] The Supreme Court in *Secretary of State* v. Joseph H. Munson

The second part of this test is obviously met here. Irving's decedent cannot rise from the grave to assert his own rights. The right to pass property by devise or inheritance, however, cannot truly be exercised until death; seemingly the right must contemplate not just, for example, the writing of the will but also the disposition of the property according to the wishes expressed therein. If heirs and devisees do not have standing to assert their decedents' rights during settlement of estates, rights of devise and inheritance becomes mirages shimmering in life but vanishing at death upon attempted use.

The nature of the right to dispose of property at death also has implications for the first factor of the third-party standing test, i.e., the relationship between the litigant and the person whose rights he seeks to asserts. Since the act of passing property has no meaning absent receipt by the selected beneficiary, section 2206 clearly "preclude[s] or otherwise adversely affect[s] a relationship existing between [Irving] and the persons whose rights assertedly are violated." *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975). "[E]njoyment of the right [of passing property at death] is inextricably bound up with the activity [inheriting property] the litigant wishes to pursue." *Singleton,* 428 U.S. at 114. We cannot set where the issues would have been more concretely presented or vigorously contested in a suit brought by Irving's decedent prior to his death. *Id.* at 115; *see also Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2848 (1984). There is no conflict of interest

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*Co.*, 104 S. Ct. 2839, 2847 (1984) states that once injury-in-fact standing (*see supra* note 12) has been established the only concern is whether the third party "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." Because the Court's analysis in that case, however, draws on the presence of first amendment issues and interweaves overbreadth doctrine, we are not certain how the holding applies to our facts and we will apply *Singleton* v. *Wulff, supra,* here anyway, it being the more restrictive.

between Irving and her decedent. *See Gold Cross Ambulance*, 705 F.2d at 1016; *see also Munson Co.*, 104 S. Ct. at 2848.

**B.**

Section 2206 in requiring that certain de minimis shares of land escheat to the individual Indians' tribes upon death in essence reduces the ownership interests of those allottees from fees to life estates, a diminution which the Supreme Court has suggested in dicta would constitute a taking without compensation in violation of the fifth amendment. *Choate* v. *Trapp*, 224 U.S. 665, 674 (1912). We need not, however, reach that far (or consider the issue of other possible constitutional limits on the power of the sovereign to abrogate inheritance, *see supra* note 3) to find that the decedents in this case had vested rights in being able to control the disposition of their property at death. Our analysis instead begins with an evaluation of the rights created in the allotment statute and patents.

The Supreme Court in *Choate* considered whether Congress could through subsequent legislation remove the tax exemption from lands allotted to individual Choctaw and Chickasaw Indians pursuant to the Atoka Agreement, which was bodily incorporated in the Curtis Act of June 28, 1898, ch. 517, §29, 30 Stat. 495, 505, 507. The Court stated that while a statute could be repealed at the will of Congress, rights acquired thereunder could not be destroyed and held that each allottee had gained a vested right protected by the Constitution because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property. 224 U.S. at 671-72. Each Indian had "furnished a consideration which was sufficient to entitle [him] to enforce whatever rights were conferred," *id.* at 672; since the Indians were bound by their concessions and could no longer be heard to assert claims to former common tribal lands, the United States

similarly was to be bound by the rights it conveyed in the statute and allotment patents. *Id.* at 674. The tax exemption was a property right incident to the land which had vested in the individual Indian allottees pursuant to the statute and patents. *Id.* at 673-77.

While the tax exemption in *Choate* was expressly limited to the original allottees, our subsequent decisions show that if more expansive vested rights are created, they may devolve to and be enforced by Indian successors to patent lands. *See County of Thurston* v. *Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). Nor do we have trouble finding in other regards that the logic of *Choate* applies to the allotment statute at issue here. In *Thurston* we construed the prototype allotment act (*see supra* note 2) as being, as in *Choate*, in the nature of a bargain, 586 F.2d at 1220; and the Sioux allotment act at issue here in fact has a specific clause to the effect that acceptance of benefits thereunder by individual Indians would be taken as a release of those individuals' claims to tribal lands. Act of Mar. 2, 1889, ch. 405, § 16, 25 Stat. 888, 893. Each Indian allottee thus gained vested rights through the Sioux land act; and the statutory language, with its provision that state law should govern inheritance, and the legislative history cited by Irving, with its emphasis on obtaining patents to protect allotments from future governmental interference (*see supra* note 10), make clear that the ability to pass the lands upon death was among the rights contemplated by the parties as vesting in the allottees. Furthermore, disposition of property at death has always been an integral and distinguishing factor as to types of property interests, and the power to control such disposition predominantly characterizes the "white man's ways" which the Indians were to assimilate. The individual Sioux thus had "enforceable expectations" that that power was part of the rights they received in return for relinquishment of their claims to former tribal lands. *See Thurston*, 586 F.2d at 1221.

By its plain terms—and there is no contention to the contrary—section 2206 does not provide for compensation to the estates of decedents for the land it declares to escheat. Accordingly, the statute is in violation of the fifth amendment, and we need not reach the further question of whether the taking was for a public purpose. We reverse the district court, declare section 2206—as written when asserted against Irving and as amended (*see supra* note 1) insofar as the new provision preserves the language of the old—unconstitutional, and remand for entry of appropriate relief.

## APPENDIX H

Public Law No. 98-608, 98 Stat. 3171 *et seq.*, which amends the Indian Land Consolidation Act of 1983, provides as follows:

(1) At the end of section 204 change the period to a colon and insert the following: "*Provided,* That –

"(1) the sale price or exchange value received by the tribe for land or interests in land covered by this section shall be no less than within 10 per centum of the fair market value as determined by the Secretary;

"(2) if the tribal land involved in an exchange is of greater or lesser value than the land for which it is being exchanged, the tribe may accept or give cash in such exchange in order to equalize the values of the property exchanged;

"(3) any proceeds from the sale of land or interests in land or proceeds received by the tribe to equalize an exchange made pursuant to this section shall be used exclusively for the purchase of other land or interests in land;

"(4) the Secretary shall maintain a separate trust account for each tribe selling or exchanging land pursuant to this section consisting of the proceeds of the land sales and exchanges and shall release such funds only for the purpose of buying lands under this section; and

"(5) any tribe may retain the mineral rights to such sold or exchanged lands and the Secretary shall assist such tribe in determining the value of such mineral rights and shall take such value into consideration in determining the fair market value of such lands.

"(b) The Secretary must execute such instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that such sale

or exchange is not in the best interest of the tribe or is not in compliance with the tribal land consolidation plan."

(2) Section 205 is amended to read as follows:

"SEC. 205. Any Indian tribe may purchase at no less than the fair market value part or all of the interests in any tract of trust or restricted land within that tribe's reservation or otherwise subject to that tribe's jurisidiction with the consent of the owners of such interests. The tribe may purchase all of the interests in such tract with the consent of the owners of over 50 per centum of the undivided interests in such tract: *Provided,* That—

"(1) any Indian owning any undivided interest, and in actual use and possession of such tract for at least three years preceding the tribal initiative, may purchase such tract by matching the tribal offer;

"(2) if, at any time within five years following the date of acquisition of such land by an individual pursuant to this section, such property is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date it is notified of such offer or petition to acquire such property by paying to the owner the fair market value as determined by the Secretary;

"(3) all purchases and sales initiated under this section shall be subject to approval by the Secretary.".

(3) Section 206 is amended to read as follows:

"SEC. 206. (a) Notwithstanding any other provision of law, any Indian tribe, subject to approval by the Secretary, may adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction, and may provide that nonmembers of the tribe or non-Indians shall not be entitled to receive by devise or descent any interest or trust or restricted lands

within that tribe's reservation or otherwise subject to that tribe's jurisdiction: *Provided,* That in the event a tribe takes such action—

"(1) if an Indian dies intestate, the surviving non-Indian or nonmember spouse and/or children may elect to receive a life estate in as much of the trust or restricted lands as such person or persons would have been entitled to take in the absence of such restriction on eligibility for inheritance and the remainder shall vest in the absence of a qualified person taking a life estate;

"(2) if an intestate Indian descendent has no heir to whom interests in trust or restricted lands may pass, such interests shall escheat to the tribe, subject to any non-Indian or non-member spouse and/or children's rights as described in paragraph (1) of this section;

"(3) if an Indian decedent has devised interests in trust or restricted lands to persons who are ineligible for such an inheritance by reason of a tribal ordinance enacted pursuant to this section, the devise shall be voided only if, while the estate is pending before the Secretary for probate, the tribe acquires such interests by paying to the Secretary, on behalf of the devisees, the fair market value of such interests as determined by the Secretary as of the date of the decedent's death: *Provided,* That any non-Indian or nonmember spouse and/or children of such decedent who have been devised such interests may retain, at their option, a life estate in such interests.

Any ineligible devisee shall also have the right to renounce his or her devise in favor of a person or persons who are eligible to inherit.

"(b) The right to receive a life estate under the provisions of this section shall be limited to—

"(1) a spouse and/or children who, if they had been eligible, would have inherited an ownership interest of 10 per centum of more in the tract of land; or

"(2) a spouse and/or children who occupied the tract as a home at the time of the descedent's death.".

(4) Section 207 is amended to read as follows:

"SEC. 207. (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

"(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

"(c) Notwithstanding the provisions of subsection (a), any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a), provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests."

(5) At the conclusion of the Act add the following new section:

"SEC. 212. Nothing in this Act shall be construed as vesting the governing body of an Indian tribe with any authority which is not authorized by the constitution and by-laws or other organizational document of such tribe."

SEC. 2. The Act of March 29, 1956 (c. 107, 70 Stat. 62; 25 U.S.C. 483a) is amended by inserting immediately after the enacting clause "(a)" and by adding at the conclusion of the Act a new subsection (b) as follows:

"(b) In the event such land is acquired by an Indian or an Indian tribe, such land shall not be removed from trust or restricted status except upon application to the Secretary under existing law."

**APPENDIX I**

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

Memorandum

To: All Area Directors
Attention: Realty Officers and Land Titles and Records Managers.

All Superintendents
Attention: Realty Officers

From: Deputy Assistant Secretary—Indian Affairs (Operations)

Subject: Interim Instructions in Implementing Sec. 207 of the Indian Land Consolidation Act of January 12, 1983.

On January 12, the Indian Land Consolidation Act (Title II of P.L. 97-459; 96 Stat. 2515) was signed into law. Sections 202 and 207 of this act read as follows:

SEC. 202. For the purpose of this title—

(1) "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2) "Indian" means any person who is a member of a tribe or any person who is recognized as an Indian by the Secretary of the Interior.

(3) "Secretary" means the Secretary of the Interior; and

(4) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by Indians or an Indian tribe subject to a restriction by the United States against alienation.

* * * * *

SEC. 207. No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation of otherwise subjected to a tribe's jurisdiction shall descedent (sic) by intestacy or divise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Section 207 effects a major change in testate and intestate heirship succession for certain undivided fractional interests in trust and restricted Indian land. Under this section, certain interests in land, as explained below, will no longer be capable of descending by intestate succession or being devised by will. Such property interests will, upon the death of the current owner, escheat to the tribe. It should be emphasized that no one currently owning property will be divested of that property.

Until regulations are promulgated, the following interim instructions relating to Section 207 will be in effect:

> "Tract" means a parcel of real property that is separately described for purposes of estate inventory.
>
> "Within a tribe's reservation or otherwise subjected to that tribe's jurisdiction" means within the exterior boundaries of a tribe's reservation as determined by the Secretary, plus any additional area over which a tribe has been determined by the United States to have civil jurisdiction.
>
> "Earned to its owner less than $100 in the preceding year before it is due to escheat" means that during the year immediately prior to the death of the decedent, $100 or more was *not* paid, or payable, to the decedent from his/her interest in a tract.

To assist Administrative Law Judges within the Office of Hearings and Appeals in the probating of trust and restricted estates of Indians dying after January 12, 1983

(the effective date of P.L. 97-459), the following data, in addition to that required by 43 CFR 4.210, must be furnished by the Superintendent:

> For each tract in which the decedent held an undivided fractional interest, the estate inventory must include the amount of that interest both in the standard fractional form and in decimal form rounded to the nearest seventh decimal place.
>
> For each tract (within a tribe's reservation or otherwise subjected to a tribe's civil jurisdiction) in which the decedent held an undivided interest of .0200000 or less, a statement of the amount of money earned from said interest which was paid or payable to the decedent during the one year period preceding his/her death. This amount must constitute only earned monetary compensation and will not include any increase in the value of the undivided interest resulting from appreciation and/or improvements. These tracts, ownership interests, etc., will be listed under a special heading on the estate inventory, or on a separate page of said inventory.

Because Section 207 of P.L. 97-459 constitutes a major change in Indian heirship succession, Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of its effects.

For any Indian dying after January 12, 1983, possessed of an undivided trust and/or restricted interest in a given tract of land, such interest will escheat to the tribe if (1) the tract is within an Indian reservation or within an area subject to the civil jurisdiction of an Indian tribe, (2) the decedent's undivided interest amounted to two percent (.0200000) or less of the total, and (3) the decedent's interest earned for him/her less than $100 in cash during the one-year period preceding death.

To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather

than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract.

Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives.

P.L. 97-459 augments and actually increases the need for accurate accountability and timely posting of trust and restricted title. All personnel within the Bureau of Indian Affairs who are responsible for these activities will maintain the highest standards possible in order to avoid the necessity for probate modifications. Such modifications, depending on the location of the tract in question, the size of the interest, and/or the earned income, could easily change the line of descent and, therefore, the ownership of that interest. Any long-standing ownership error, originating in wrongful reporting of any of the above factors, could make the Bureau of Indian Affairs liable to suit especially where income has been derived from the inherited interest and spent by the incorrect owner.

It is anticipated that the Office of Hearings and Appeals will soon be meeting to address the need for regulatory changes brought about by Section 207 of P.L. 97-459. Until such time, the above instructions will remain in effect. Please refer any questions to our Division of Real Estate Services.

Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 85-637

In The
# Supreme Court of the United States
October Term, 1985

—o—

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
*Appellant,*

v.

MARY IRVING, ET AL.,
*Appellees.*

—o—

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

—o—

## MOTION TO AFFIRM

—o—

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## QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that 25 U.S.C. §2206, as originally enacted and as amended, violates the Fifth Amendment because it does not provide for compensation to the estates of decedents for the land it declares to escheat.

## PARTIES TO THE PROCEEDINGS BELOW

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross.

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No. 85-637

In The
# Supreme Court of the United States
October Term, 1985

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
*Appellant,*

v.

MARY IRVING, ET AL.,
*Appellees.*

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## MOTION TO AFFIRM

Appellees, pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the Eighth Circuit Court of Appeals be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Appellees accept those portions of Appellant's Jurisdictional Statement entitled OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED and STATEMENT.

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## REASONS FOR AFFIRMING THE EIGHTH CIRCUIT COURT OF APPEALS

### I. The Decedents Held Vested Property Interests Under the Act of March 2, 1889, Which Included Right to Pass Their Property upon Death.

The Eighth Circuit held that the Appellees' decedents, as successors in interest to the original Indian allottees, had a vested property right to pass their property upon death. (Appt. Jur. St., 16a) This holding is firmly grounded on the circumstances surrounding the allotment of the Great Reservation of the Sioux Nation and sound canons of construction developed by this Court based upon the premise "that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *Handbook of Federal Indian Law*, 221 (1982 ed.).

#### A. History of Act of March 2, 1889

Appellees have accepted Appellant's statement on the historical background on the allotment of the Great Reservation of the Sioux Nation. However, additional historical material is necessary for the Court to have a complete picture of this allotment process.

The Act of March 2, 1889, ch. 405, 25 Stat. 888, *et seq.*, declared that the Great Reservation of the Sioux Nation,

comprising most of what is now South Dakota, west of the Missouri, would be allotted to individual Sioux Indians (hereafter the Sioux) and all surplus tribal land would be opened to non-Indian settlers. However, the Act also provided that its provisions would be implemented only after acceptance and consent by three-fourths of the male Indian population.[1]

A commission was sent to the Great Reservation of the Sioux Nation to obtain the required approval of the adult male population in 1889.[2] Senate Executive Document No. 51, 51st Cong., 1st Sess. (1890), found in Serial Set 2682,

---

1 Act of March 2, 1889, ch. 405, § 28, 25 Stat. 899, provided:

> "That this Act shall take effect, only upon the acceptance thereof and consent thereto by the different bands of Sioux Nation of Indians, in the manner and form prescribed by the twelfth article of the treaty between the United States and Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight[.]"

Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635, required:

> "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article 6 of this treaty."

2 This was the second such commission sent out to meet with the Sioux. The first one sought to obtain approval of the Act of April 30, 1888, ch. 205, 25 Stat. 94 *et seq.*, which also provided for the allotment of the Great Reservation of the Sioux Nation. That commission was unsuccessful in obtaining the required consent of the Sioux.

is the report of this commission. In the appendix at exhibit c are diary entries of the commission which include representations made by the commissioners regarding the ability of the allottees to pass their allotments to their "children" and their "children's children." (Appt. Jur. St., 11a-12a, f.n. 10). Equally important are the several entries which reflect the Sioux's understanding that upon death they could pass their allotments to their families, without the fear that anyone, even the federal government, would take them away.[3] Based on the commissioners' assurances to the Sioux that this understanding was correct,[4] the Sioux accepted and consented to the allotment of their lands and the relinquishment of surplus lands. Only then did the Act of March 2, 1889 become law.[5]

---

3 A representative entry expressing the understanding of the Sioux is found in the words of Standing Bear:

> "I want you to take your land in severalty and the Government will have to survey it for you and give you papers for it, so that nobody can take it away from you and when you are dead nobody can take it away from your families." S.Exec.Doc.No. 51, *supra*, at 51 (At the Rosebud Agency, Dakota, June 7, 1889).

4 At the Pine Ridge Agency on June 21, 1889, Bear Nose specifically sought such an assurance from General Crook:

> Bear Nose: "My understanding is with the Commissioners; and when you take this back to the Great Father, and we have agreed to let you have this you have spoken for, and we take our land in severalty, nobody can come up and take our land away from us. That is my understanding."
>
> General Crook:
>
> "That is right."
>
> S.Exec.Doc.No. 51, *supra*, at 111.

5 "The deed submitted herewith is executed and signed by 4,463 being over 3/4s of the adult male Indians occupying or interested in the Great Sioux Reservation; the whole number being 5,678." Letter from Secretary of Interior John W. Noble, January 30, 1890 to President Benjamin Harrison. S.Exec.Doc. 51, *supra* p. 8.

The Appellant argues that the term "heirs" as used in the Act of March 2, 1889, placed restrictions on the ability of the Sioux to pass property upon death. (Jur. St., 23). The Act of March 2, 1889, ch. 405, § 11, 25 Stat. 891, provided that lands allotted to individual Sioux would be held in trust by the federal government for twenty-five years "for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located."

The Indians understood this language to mean that their property interest gained by the allotment process would pass to their families, i.e. when they die a member of their family would then own the land and have the right to pass it on at the time of death. *See supra* f.n. 3 and 4, at 3. The Sioux would not have attached significance to the distinction between "heirs at law" as compared to "heirs testamentary" nor appreciated the word "descent" as a term of art designating intestate succession. The Sioux were unlettered and generally unschooled and surely cannot be held to have understood the specific state laws governing intestate succession or general principles of testamentary disposition.

The testamentary control that the Indians gained by the Act of June 25, 1910, ch. 421, § 2, 36 Stat. 855 (codified as amended at 25 U.S.C.A. § 373 (1983)), was but one aspect of the broader right vested in the original allottee and his successors in interest. Congress by the Act of June 25, 1910 "sought to fill gaps and deficiencies in the administration of estates of allottees." F. Cohen, *supra,* 134 (1982 ed.). The Act of June 25, 1910 did not alter the

vested property interest of the original allottee and his successors to pass property at death, only expanded the ways that an allottee could exercise this right.

It is reasonable to conclude that the ability to will property was a part of the bargain between the Sioux and the federal government. The bargain being that in exchange for the Sioux's release of their common claims to tribal lands, the individual allotted interests obtained by the Act of March 2, 1889 would endure and pass to their children or family members. That the concept of inheritance by devise would eventually be exercised by Indian people is consistent with the grand purpose behind the allotment era to convert Indians to individual property ownership. F. Cohen, *Handbook of Federal Indian Law*, 206-210 (1942).

Finally, the power to devise interests in land is an act of alienation distinct from the ability to pass land to one's heirs. *LaMotte v. United States*, 254 U.S. 570, 579 (1921). The gradual removal of restrictions against alienation was consistent with the federal government's policy of assimilating Indians to white man's culture and enhanced the basic right of passage of interests originally contemplated by the parties.

### B. Construction of the Act of March 2, 1889

In construing statutes passed for the benefit of Indian people, this Court developed canons of construction based upon its presumption of Congress' benevolent intent toward its wards, the Indian people. *See generally*, F. Cohen, *supra*, 221-225 (1982 ed.). Three of these canons are applicable to the Act of March 2, 1889. These canons are reflected in the Eighth Circuit's holding that the

original allottees and their successors received a vested right to pass their property upon death.

The first canon of construction, stated most recently in *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267, 2275 (1984), and applicable to construing the Act of March 2, 1889 is:

> that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918).

One of the avowed purposes of the Act of March 2, 1889, was to give the Sioux the benefits of white civilization, specifically individually held property rights. F. Cohen, *supra*, 206-210 (1942). Therefore, when construing the term "his heirs" from Section 11 of that Act, it is violative of this canon to interpret it in a restrictive manner and against the Sioux. It is to the Sioux's benefit to have the term construed allowing their property to pass upon death to their families. Further, it was what the Sioux understood to be the case. *See supra* f.n. 3 and 4, at 3.

A construction of the Act of March 2, 1889 which deprives the Sioux of the right to pass these property interests at death would also violate the canon that:

> a treaty with the Indians [must be construed] as that 'unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules'.

*Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, f.n. 2 (1968). This canon is applicable to the allotment of the Sioux since the agreement and consent of three-fourths of the male Sioux was a precondition to the Act of March 2, 1889 taking effect.[6] The understanding of the "unlettered" Sioux was that they would be able to pass their allotments upon death to their families without fear that anyone, including the federal government, would be able to take them away. That understanding should control and not the technical meaning of "heirs" as known in non-Indian property law.

Finally, the Eighth Circuit's construction of the Act is consistent with a third canon: "an appreciation of the circumstances in which the words [of the Act] are used." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). An agreement was reached between the Sioux and the federal government to obtain the consent of the Sioux to the Act of March 2, 1889. The agreement was that for lands allotted in severalty, the Sioux would relinquish title to all communally held lands. That agreement was based in part upon the representations of the commissioners and the understanding of the Sioux people as to their ability to pass individually held property upon death. The Eighth Circuit's appreciation of these circumstances is demonstrated in its holding that allottees and their successors have a vested property right which includes the ability to pass the property upon death.

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6 F. Cohen, *supra*, 224, f.n. 60 (1982 ed.). "That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders and statutes, neither of which directly involved negotiations with the tribes."

E.g. *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Marlin v. Lewallen*, 276 U.S. 58 (1928); *Starr v. Long Jim*, 227 U.S. 613 (1913); and *Choate v. Trapp*, 224 U.S. 665 (1912) where this rule was applied to statutes based upon Indian consent.

### C. Vested Rights Arising from Act of March 2, 1889

This Court should affirm the Eighth Circuit's decision which reasoned that the allottees and their successors obtained a bargained for right to pass property upon death. The Eighth Circuit correctly held that the bargain struck between the commission and the Sioux is indistinguishable from the "bargained for right" of a tax exemption in *Choate v. Trappe*, 224 U.S. 665 (1912). *Choate* founded that holding upon the existence of a 1897 contract, the Atoka Agreement between the Dawes Commission and the Choctaws and the Chickasaws, which was embodied in the Curtis Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505, 507. Under the agreement, each tribal member was to receive an allotment which was to be non-taxable for a limited period of time. As consideration for the allotment, each tribal member consented to the allotment of all tribal lands and relinquished his interest in all communally held tribal property. This Court held that the allottees, individual owners of nontaxable land, possessed a vested right to the tax exemption and Congress had no power to remove the exemption without compensation. The existence of the Atoka Agreement, embodied in the Curtis Act, in which the Indians relinquished their common rights in tribal land as consideration for the tax exempted allotments, is repeatedly referred to in *Choate*.

The situation in *Choate* is materially indistinguishable from the situation in the present case. *See supra* pp. 2-4. The Sioux by their consent to allotment and relinquishment of surplus lands gave consideration for the individual allotments each member received. Based upon the reasoning in *Choate*, the original allottees and their successors,

Appellees' decedents, obtained vested rights in their individually held allotments.

The Eighth Circuit, at Appt. Jur. St., 15a, recognized the "bargained for" nature of the vested property rights in *Choate,* "that each allottee had gained a vested right . . . because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property." Then the Eighth Circuit, *supra,* 16a, correctly applied the logic of *Choate* in holding that the Sioux obtained under the Act of March 2, 1889, vested rights including the right to pass property acquired by allotment upon death. *See supra* sections I.A. and B. This holding of the Eighth Circuit should be affirmed by this Court.

## II. The Decedents as Individual Indians with Vested Property Interests Were Guaranteed Protection for These Property Interests Under the Fifth Amendment.

The decision by this Court in *Choate* is also important to the case at hand because it defines the protection to be afforded vested property rights held by individual Indians:

> There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent in the same way as other residents or citizens of the United States.

*Id.* at 677. The Eighth Circuit first correctly found a vested property interest in the original allottees and their successors in interest to pass the lands received by allot-

ment upon death under *Choate*. Then the Eighth Circuit correctly found under *Choate* that these vested property interests were protected by the Fifth Amendment to the Constitution. As a consequence, the Eighth Circuit held the escheat provision of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 98 Stat. 2517 *et seq.*, § 207, 25 U.S.C. § 2206, unconstitutional because it takes Appellees' decedents' property without compensation. (Appt. Jur. St., 16a-17a). This holding is consistent with *Choate* which states that:

> Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than other rights in property. No statute would have been valid which reduced *his fee to a life estate or attempted to take from him ten acres*, or fifty acres, or the timber growing on the land . . . It is conceded that no right which was actually conferred upon the Indian can be arbitrarily abrogated by statute.

*Id.* at 674. (Emphasis added).[7]

The opinion below rests squarely upon *Choate* which has been consistently adhered to by both lower federal courts and this Court.[8] In short, Indian allottees and their

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7 *Choate* refutes the argument of the Appellant based upon *Andrus v. Allard*, 444 U.S. 51 (1979). *See* Jur. St., 20-21. Appellant argues that the denial of one traditional property right out of a full "bundle" of property rights may not always amount to a taking. However, the "strand" that the escheat provision takes is the right to pass the property upon death. This converts the decedents' property from a fee interest to a life estate in violation of the Fifth Amendment under the explicit language of *Choate*.

8 *E.g. Mott v. United States*, 283 U.S. 747, 752 (1931); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1929); *Morrow v. United States*, 243 F. 854, 856 (8th Cir. 1917); *Bryan County, Oklahoma v. United States*, 123 F.2d 782, 784 (10th Cir. 1941); and *United States v. Nez Perce County*, 95 F.2d 232, 235 (9th Cir. 1938).

successors in interest have judicially established constitutionally protected property rights in individually owned allotments. This has been consistently reiterated and entrenched in the decisions of this Court so much so that no legitimate challenge may now be raised. The Eighth Circuit's opinion below simply reaffirmed this established rule of law. Consequently, the decision of the Eighth Circuit should be affirmed by this Court without further proceedings.

The Appellant fails to appreciate the distinctions between an individual Indian's property and tribal property and the distinctions between personal status and property rights.[9] These distinctions are crucial to this case which is solely concerned with individually held property. Congress' broad powers to re-allocate Indian property are limited by the Fifth Amendment as to property held by an individual Indian. *Gritts v. Fisher*, 224 U.S. 640 (1912) considered during the same term as *Choate* and decided on the same day as *Choate*, held that individual Indians have no rights in tribal property. At the same time, this Court in *Gritts* expressly disclaimed Congress could re-

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[9] *See* Jur. St., 15-16. In *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), it was held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to his personal status, not a property right. A conclusion expressly noted by this Court in *Choate*. "Nothing that was said in *Tiger* . . . is opposed to the same conclusion here. For that case did not involve property rights . . ." *Id.* at 678. In *United States v. Kagama*, 118 U.S. 375 (1886), the power of Congress is established to regulate the personal conduct of Indian people by federal criminal prosecutions.

The remaining cases cited by the Appellant deal with tribal land, not individually owned land, and fall under the *Gritts* rule, *infra*.

allocate individual Indian property in recognition of *Choate*.

*Choate* and *Gritts* established that Congress may not indiscriminately exercise control over reservation lands. Rather, the extent to which Congress may exercise control over such lands depends upon the type of ownership of the land. Congress may re-allocate benefits of tribal land as it sees fit.[10] But as to individual property, such as the property at issue here, Congress may only manage it, subject to the constitutionally protected property rights of individual owners.

Appellees recognize that the plenary powers of Congress authorize it to pass legislation to address the fractionated heirship problem. (*See* Jur. St., 3-7). Such legislation must "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977). But these broad plenary powers are specifically limited to protect the constitutional rights of individual Indians. This Court in *Choate* specifically addressed this issue and found:

> [t]here was no indication that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment.

*Id.* at 578.

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[10] *E.g. Gritts; United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972); and *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

Therefore, Congressional attempts to address the fractionated heirship problem must, at a minimum, provide for compensation to be paid for the property taken from individual Indians. The Eighth Circuit correctly struck down Section 207 of the Indian Land Consolidation Act, as originally enacted and as amended, because "by its plain terms . . . [it] does not provide for compensation to the estates of decedents for land it declares to escheat." (Appt. Jur. St., 17a).

———o———

## CONCLUSION

The Appellees respectfully move that the Eighth Circuit decision be affirmed.

*Choate* and the Eighth Circuit's decision parallel each other in many respects: both involve individual Indian property rights; both involve "bargained for" property rights in trust allotments; both affirm the existence and protection of such rights; both reject attempts to divest such rights by a later federal statute; and both limit the federal government's powers as a guardian of the Indians' private property. In the face of these parallels, *Choate* clearly controls the disposition of this case and an affirmance of the Eighth Circuit's decision is required.

Respectfully submitted,

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*Attorneys for Appellees*

Supreme Court, U.S.
FILED
APR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-637

(5)

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
APPELLANT

*v.*

MARY IRVING, ET AL.

---

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

## JOINT APPENDIX

---

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*P.O. Box 727*
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*Counsel for Appellant*

JURISDICTIONAL STATEMENT FILED OCTOBER 15, 1985
PROBABLE JURISDICTION NOTED JANUARY 13, 1986

43pp

# In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-637

DONALD P. HODEL, SECRETARY OF THE INTERIOR, APPELLANT

*v.*

MARY IRVING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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* The opinions of the district court and the court of appeals are printed in the appendices to the jurisdictional statement and have not been reproduced.

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Jan. 30 | (2) | APPEARANCE for appellant. |
| " " | (3) | APPEARANCE for appellee. |
| Feb. 21 | (4) | APPEARANCE for appellee. (William Clark) |
| Feb. 27 | (5) | *BRIEF APPELLANT* w/ser 2/24 8 copies cmm |
| Feb. 27 | (6) | MOTION of Oglala Sioux Tribe to file amicus curiae brief cm |
| " " | (7) | MOTION for ext. of time to file amicus brief cm |
| Feb. 29 | (8) | ORDER: Motion of Oglala Sioux Tribe for leave to participate in the above matter as amicus has been filed. Parties are notified that absent the filing of a formal objection to the motion within 10 days such objection will be considered waived and the motion will be deemed granted. An appropriate briefing schedule will thereafter be established |
| Mar 14 | | REVISED BRIEFING SCHEDULE: Brf Amicus (Oglala Sioux) 4/3/84 Brf Aplee: 5/3/84 |
| Mar 12 | (9) | MTN APPELLANT for ext of time to file reply brf—GRANTED—to April 12, 1984 on Mar 16, 1984. vmk |
| Apr. 9 | (10) | *BRIEF AMICUS CURIAE* (oglala Sioux) w/ser 4/2 7 copies cm |
| Apr. 25 | (11) | Motion xtn. time to file federal appellees br. . . . MOTION granted to all federal appellees, to May 24, 1984 w |
| May 25 | (12) | *BRIEF APPELLEE* w/ser 5/24, 7 copies |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| May 25 | | To Screening 20 MIN |
| June 4 | (13) | MOTION xtn. time to file reply br. aplnt. Motion granted to June 21 w |
| June 25 | (14) | *REPLY BRIEF* w/ser 6/21 8 copies (covers) cm |
| Sep 18 | | Transferred to October session at St. P. |
| 2/1/84 | | 3 copies D.R. |
| 2/27/84 | | 3 copies Exhibits (supp. to D.R.-part of complaint) |
| Oct 8 | | ARGUED AND SUBMITTED TO JUDGES HEANEY, HENLEY AND JOHN R. GIBSON IN ST. PAUL, MN. Yvette Hall War Bonnet for aplnt; Blake A. Watson D.J., for aplee; Ms. Bonnet on rebuttal (RECORDED) |
| 1985 | | |
| Mar. 29 | (15) | OPINION BY JOHN R. GIBSON PUBLISHED 758 F.2d 1260 85 |
| Mar. 28 | (16) | JUDGMENT: Judgment of Dist. Ct. reversed & cause remanded to Dist. Ct. w/ directions in accordance w/opinion. |
| Apr. 10 | (17) | MOTION appellees for extension of time to file petition for rehearing w/service. |
| Apr. 23 | (18) | ORDER: Motion of the appellees for an extension of time to and May 13, 1985 to file petition for rehearing is granted. |
| May 13 | (19) | PETITION APPELLEES FOR REHEARING WITH SUGGESTION OF EN BANC CONSIDERATION. w/service. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1985 | | |
| June 6 | (20) | ORDER: Appellees' petition for rehearing en banc has been considered by the Court and is denied. Petition for rehearing by the panel is denied. |
| June 13 | | MANDATE ISSUED (eh) |
| June 21 | (21) | RECEIPT FOR MANDATE. |
| July 2 | (22) | NOTICE OF APPEAL to the Supreme Court of the United States. |
| Sept. 4 | | NOTIFICATION that extension of time was granted in which to file petition for writ of certiorari to October 15, 1985. |
| Oct. 22 | (23) | NOTICE OF FILING of petition for writ of certiorari to Supreme Ct. as Case No. 85-637, dated October 15, 1985. |
| 1986 | | |
| Jan. 17 | (24) | CERTIFIED COPY OF ORDER of Supreme Court noting probable jurisdiction in Case No. 85-637, dated January 13, 1986. |

A true copy

ATTEST:

/s/ Michael E. [Illegible]
Chief Deputy Clerk
United States Court of Appeals
Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

---

No. 83-5139

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISSONETTE AS GUARDIAN FOR DUANE CROSS, MIGUEL CROSS, HOPE CROSS, ANTHONY CROSS, FAITH CROSS, AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

*v.*

JAMES WATT, SECRETARY, DEPARTMENT OF INTERIOR AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT

---

**RELEVANT DOCKET ENTRIES**

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1983 | | |
| Oct. 20 | 1 | CIVIL Cover Sheet |
| Oct. 20 | 2 | COMPLAINT w/o Demand for Jury Trial (*EXHIBITS IN EXPANDO*) |
| Oct. 20 | | Issuing 60-Day SUMMONS fur. 5 copies to Atty. Richards for Service |
| Oct. 20 | 3 | MOTION of Plff. for Order to Show Cause for Preliminary Injunction |
| Oct. 20 | 4 | MEMORANDUM of Law in Support of a Preliminary Injunction. |
| Oct. 20 | 5 | MOTION of Plffs. for Certification as a Class Action |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1983 | | |
| Oct. 20 | 6 | MEMORANDUM in Support of Motion for Certification as a Class Action |
| Oct. 26 | 7 | ORDER that Dfdts. Respond to Plffs. Motions by 11-10-83 |
| Oct. 26 | | Notice of entry & copy of Order mailed Bette Bunker Richards & del. U.S. Atty., RC |
| Nov. 9 | 8 | MOTION of Govt. Re: Extension of Time to Respond & Continuing Hrg. Date |
| Nov. 10 | 9 | ORDER Granting Govt. Motion for Extension of Time Until 11-14-83 and Continuing Hearing until 11-17-83 @ 10 AM |
| Nov. 10 | | Notice of entry & copy of Order mailed Bette Richards & del. U.S. Atty., RC |
| Nov. 10 | | Telephonic Notice made to Bette Richards @ 11:00 A.M. |
| Nov. 14 | 10 | OPPOSITION of Dfdt. to Plffs.' Motion for Certification as a Class Action |
| Nov. 14 | 11 | MEMORANDUM of Law in Opposition to Plffs.' Motion for Preliminary Injunction |
| Nov. 14 | 12 | CERTIFICATE of Service |
| Nov. 17 | | Enter Proceedings on Plffs. MOTION FOR ORDER TO SHOW CAUS FOR PRELIMINARY INJUNCTION & CERTIFICATION AS CLASS ACTION before the Hon. Andrew W. Bogue, Chief Judge, Presiding |
| Nov. 17 | | Enter ORDER combining hearing for temporary & permanent preliminary injunction |
| Nov. 17 | | Enter ORDER Reserving Ruling on Motion for Certification as a Class Action |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1983 | | |
| Nov. 17 | | Enter ORDER Restraining Dfdt. from Proceeding Under Escheat Provision of Indian Land Consolidation Act w/Regard to Plffs. in this Action |
| Nov. 17 | | Enter ORDER that Dfdt. is not Restrained from Continuing w/Probate Proceedings Regarding Plffs. Concerning Interests in Land Unrelated to Escheat Provision |
| Nov. 17 | 13 | EXHIBIT List |
| Nov. 17 | 14 | ORDER that Trial of Action on Merits be Consolidated w/Hearing on Application for Preliminary Injunction; *Granting* Plffs. Motion to Amend Certification Motion; *Reserving Ruling* on Plffs. Motion for Certification as Class Action; *Restraining* Dfdts. from Proceeding Under Escheat Provision of Indian Land Consolidation Act w/regard to Plffs. in this Action; & *Setting* Briefing Schedule |
| Nov. 17 | | Notice of entry & copy of Order mailed Bette Bunker Richards & del. U.S. Atty., RC |
| Nov. 17 | | Correct copy entered 1983 WDOB page 207 |
| Nov. 28 | 15 | MEMORANDUM of Authority Re: Constitutionality of Plff. |
| Dec. 5 | 16 | SUPPLEMENTAL Memorandum in Opposition to Motion for Preliminary Injunction of Govt. |
| Dec. 12 | 17 | RULE 16(b) Scheduling Request |
| Dec. 12 | | Mailing Ruled 16(b) Scheduling Request B. Richards Delivered US Atty., RC |
| Dec. 12 | 17A | REPLY to Supplemental Memorandum |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1983 | | |
| Dec. 15 | 18 | MEMORANDUM OPINION Denying Motion for Permanent Injunction & Motion for Class Action |
| Dec. 15 | | Notice of entry & copy of Order mailed Bette Bunker Richards & del. U.S. Atty., RC |
| Dec. 15 | | Correct copy entered 1983 WDOB page 223 |
| Dec. 15 | 19 | ORDER finding 25:2206 is Constitutuion; Denying Plff. Motion for Permanent Injunction & Plff. Motion for Class Action |
| Dec. 15 | | Notice of entry & copy of Order mailed Bette Richards & del. U.S. Atty., RC |
| Dec. 15 | | Correct copy entered 1983 WDOB page 224 |
| 1984 | | |
| Jan. 11 | 20 | NOTICE OF APPEAL by Plffs. |
| Jan. 11 | | C copy of Notice of Appeal mailed Bette Bunker Richards and del. U.S. Atty.'s Office, RC |
| Jan. 11 | | C copy del. T. Daniel Thompson, Court Reporter, Rm. 330, 515 9th Street, Rapid City, SD 57701 605-348-8610 |
| Jan. 11 | | Mailing Record on Appeal to Robert St. Vrain, Clerk, U.S. Court of Appeals for the Eighth Circuit, St. Louis, MO 63101 |
| Jan. 11 | | Mailing copy of Record on Appeal to David Maland, U.S. Court of Appeals, 525 Fed. Court Bldg., 316 North Roberts St., St. Paul, MN 55101 |
| Jan. 11 | | Certificate of Mailing by Plff. |
| Jan. 19 | 21 | DESIGNATION Of Record by Appellants |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Jan. 19 | 22 | NOTICE Regarding Transcript by Appellant |
| Jan. 19 | | Certified copy of Notice del. T. Daniel Thompson, Court Reporter |
| Jan. 25 | 23 | NOTICE Regarding Transcript by Appellee |
| Jan. 25 | | Certified copy of Notice del. T. Daniel Thompson, Court Reporter |
| Jan. 25 | 24 | DESIGNATION Of Record on Appeal by Appellee |
| Jan. 30 | | Mailing Designated Record on Appeal to Robert D. St. Vrain, Clerk, U.S. Court of Appeals for the Eighth Circuit, 1114 Market St., Rm. 511, U.S. Customs & Court House, St. Louis, MO 63101; and David Maland |
| 1985 | | |
| June 17 | 25 | MANDATE Of US Court of Appeals remanding to District Court |
| June 17 | | C. copy mailed Bette Bunker Richards & del. US Atty., RC |
| June 17 | | OPINION of US Court of Appeals |
| June 17 | | C. copy mailed Bette Bunker Richards & del. U.S. Atty., RC |

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

---

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISSONETTE AS GUARDIAN FOR DUANE CROSS, MIGUEL CROSS, HOPE CROSS, ANTHONY CROSS, FAITH CROSS, AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

*—vs—*

JAMES WATT, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT

---

**COMPLAINT**

## I. PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief arising out of Defendant's wrongful taking of Plaintiffs' land without compensation pursuant to the Indian Land Consolidation Act (Title II of P.L. 97-459; 96 Stat. 2515) Section 207. The Plaintiffs seek to have this Court declare that Section 207 of the Indian Land Consolidation Act is an unconstitutional taking of the land in violation of the Fifth Amendment of the U.S. Constitution.

The Plaintiffs also seek injunctive relief from said Section 207 of P.L. 97-459 preventing Defendant and his Agents from acting under said Act to escheat any land to the Indian Tribes.

## II. JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 USC 1331 which confers original jurisdiction upon the District Courts of all civil actions arising under the Constitution and laws of the United States.

3. Plaintiffs' action for declaratory relief is authorized by Rule 57 of the Federal Rules of Civil Procedure and by 28 USC § 2201 and § 2202. Plaintiffs' action for temporary injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

## III. PLAINTIFFS

4. The named Plaintiff Mary Irving is an enrolled member of the Oglala Sioux Tribe and resides on the Pine Ridge Indian Reservation in South Dakota. Plaintiff is the daughter and potential heir of Chester Irving who died on March 18, 1983. Chester Irving died possessed of two (2) parcels of land subject to Section 207 of P.L. 97-459.

5. The named Plaintiff Patrick Pumpkin Seed is an enrolled member of the Oglala Sioux Tribe and resides on the Pine Ridge Indian Reservation in South Dakota. Plaintiff is the son and potential heir of Charles Leroy Pumpkin Seed who died on April 4, 1983. Charles Leroy Pumpkin Seed died possessed of eight (8) parcels of land subject to Section 207 of P.L. 97-459. Plaintiff is the nephew and potential heir of Edgar Pumpkin Seed who died June 23, 1983. Edgar Pumpkin Seed died possessed of five (5) parcels of land subject to Section 207 of P.L. 97-459.

6. The named Plaintiff Elaine Bissonette is an enrolled member of the Oglala Sioux Tribe and resides in Downey, California. Plaintiff is legal guardian of the minor children of the late Geraldine Poor Bear Cross, namely Duane Cross, Miguel Cross, Hope Cross, Anthony Cross and Faith Cross. Geraldine Poor Bear Cross died possessed of seventeen (17) parcels of land subject to Section 207 of P.L. 97-459.

7. The Plaintiffs bring this action pursuant to Federal Rule 23 of Civil Procedure, 28 U.S.C.A. authorizing class actions. The class consists of all heirs and potential heirs of persons dying possessed of lands subject to escheat to the Tribe(s) pursuant to Section 207 of P.L. 97-459.

The class is so numerous that the joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of the representative parties are typical of the claims of the class. The representative parties will fairly and adequately protect the interests of the class. Moreover, the Defendant has acted or will act on grounds generally applicable to the class, making final injunctive and declaratory relief appropriate with respect to the class as a whole.

## IV. THE DEFENDANT

8. James Watt is the Secretary of the Department of the Interior and has the ultimate responsibility for the operations of the Bureau of Indian Affairs including the probate of lands held in trust by the United States for the benefit of Indians.

## V. ALLEGATIONS OF FACT

9. On January 12, 1983, Congress implemented Section 207 of P.L. 97-459, the Indian Land Consolidation Act. This Act provides that all persons who died possessed of undivided fractional interests in any tract of trust or restricted land within a Tribe's jurisdiction will escheat to the Tribe if that interest represents 2 per centum or less of the total acreage in such tract and has earned less than $100 in the proceeding year.

10. On March 18, 1983, Chester Irving, Plaintiff Mary Irving's father, died possessed of land subject to escheat under Section 207 of P.L. 97-459. See Data for Heirship attached as Exhibit "A" and incorporated herein by reference. Plaintiff Mary Irving is named as a potential heir on page 7 of said Exhibit "A" and will become an actual heir absent the discovery of a Will or contrary evidence regarding her relationship to deceased at the probate hearing. Plaintiff has an interest in parcel OS-72 Mary Janis allotment which she shares with six other potential heirs. The amount of land contained in this parcel to which she has an interest is

.0052083 of 160 acres which amounts to .9 of an acre more or less. The estimated value is $50.00. The income for preceding year was $5.35. This parcel is more than adequate to build homes on for all potential heirs.

11. Plaintiff Mary Irving has a potential 1/7 interest in parcel OS-6540 Millie B. Tobacco allotment amounting to 1/320 of 320 acres which is 1 acre and sufficient to build several homes on. The estimated value is $60.00. The income for preceding year was $2.00.

12. On March 23, 1983, the mother of Daune Cross, Miguel Cross, Hope Cross, Anthony Cross and Faith Cross died. On July 12, 1983, Elaine Bissonette was appointed legal guardian of the above named minor children by the Oglala Sioux Tribal Court. See Exhibit "B" attached and incorporated herein by reference. A Data for Heirship was prepared by the Bureau of Indian Affairs indicating above named minor children are potential heirs of the deceased Geraldine Poor Bear Cross. See Exhibit "C" attached and incorporated herein by reference. On March 16, 1983, decedent executed a Last Will and Testment leaving all her worldly goods to said minor children share and share alike. See Exhibit "D" attached and incorporated herein by reference.

13. Plaintiff decedent Geraldine Poor Bear Cross died possessed of fifteen parcels of land subject to escheat pursuant to Section 207 of P.L. 97-459. Nine parcels have an aggregate estimated value of $1,192.91. Income for preceding year totaled $100.56. See pages 10-11, Exhibit "C". Six parcels contain mineral rights only. No appraisal has been made as to the value of the mineral rights and no income was received for the preceding year. See pages 11-13 Exhibit "C".

14. On June 14, 1983, Edgar Pumpkin Seed, the Uncle of Plaintiff Patrick Pumpkin Seed, died. See Exhibit "E" attached and incorporated herein by reference. Plaintiff is named as a potential heir. See page 8, Exhibit "E". Decedent died possessed of five parcels of land subject to escheat pursuant to Section 207 of P.L.

97-459. The total estimated value of said land is $3,292.12. The total income for the preceding year was $54.98. One particular parcel namely OS-7208, Helen Eagle Shield allotment, is valued at $2,212. Decedent had a 1/6 interest in 165.90 acres or 27.65 acres, more or less. If divided by all 13 potential heirs each heir would receive 2.15 acres, more or less, which is more than adequate to build a home on.

15. Plaintiff Patrick Pumpkin Seed's father died on April 3, 1983. At the time of his death, Charles Leroy Pumpkin Seed possessed eight parcels of land subject to escheat under Section 207 of P.L. 97-459. See Data on Heirship prepared by the Bureau of Indian Affairs marked Exhibit "F" attached and incorporated herein by reference. Plaintiff is named as a potential heir to these lands. See page 8 of Exhibit "F". The total income for preceding year is $23.28. Decedent possessed a 1/64 interest in two parcels containing 160 acres. This amounts to 2.5 acres in each parcel. Decedent left only two potential heirs. Each heir would receive over an acre in those two parcels. See OS-768 Asa Pumpkin Seed allotment, page 12 of Exhibit "F". See OS-7676 Bessie Emily Pumpkin Seed allotment, page 13 of Exhibit "F". Decedent also had a 1/72 interest in 320 acres amounting to 4.52 acres more or less. Each heir would receive over 2 acres in these two parcels. See OS-168 David Shot allotment, page 13 of Exhibit "F".

16. The Indian Land Consolidation Act, P.L. 97-459, does not provide any compensation for the lands which will escheat to the Tribe pursuant to Section 207 of that Act.

17. Many of the parcels of land subject to escheat are sufficiently large that when divided by all potential heirs, Plaintiffs would retain a suitable building site.

18. The Defendant has a duty to protect the interests of the Plaintiffs' in the use of their land.

19. The Defendant has promulgated regulations at 25 CFR § 152.18 forbidding the sale in South Dakota, Okla-

homa and Minnesota of any trust land in which any minor has an interest and requiring the consent of the guardian in all other States.

20. The Defendant has promulgated regulations at 25 CFR § 152.22(b) allowing the conveyance of any lands held in trust by the United States for an Indian Tribe only where specific statutory authority exists and only then with the approval of the Defendant, thereby precluding the possibility that the Tribe(s) might reconvey the land to the individual Indians once it has been transferred to Tribal ownership.

## VI. FIRST CLAIM FOR RELIEF

The Defendant has a duty to protect the interests of individual Indians in their trust lands. Implementation of this Act deprives Indians of their interests in land without compensation and for no public purpose in violation of Plaintiffs' right under the Fifth Amendment to the U.S. Constitution. Defendant in the implementation of the Act must violate previous policies and regulations which were promulgated to protect Plaintiffs and others so situated.

## VII. IRREPARABLE INJURY

If Defendant is not enjoined immediately from acting upon Section 207 of P.L. 97-459, the Plaintiffs and the class they seek to represent will suffer immediate and irreparable injury in that their income will be diminished, their capability of using their land for a homesite will be lost or diminished, and their potential of realizing future income from unlocated minerals will be lost.

Probates have been scheduled on Plaintiffs' decedants Estates and others effected by P.L. 97-459, Section 207 beginning October 24, 1983. An immediate temporary injunction is needed to prevent irreparable harm to Plaintiffs. See Exhibit "G" attached and incorporated herein by reference.

## VIII. INADEQUATE REMEDY AT LAW

Plaintiffs have no adequate or complete remedy at law to redress the suffering herein. The implementation of the Act is automatic and does not provide for any procedure for hearing, protest or appeal.

## IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court:

1. Assume jurisdiction of this cause and set this case down promptly for hearing.
2. Determine, pursuant to Federal Rule 23 of Civil Procedure, 28 U.S.C.A. that this action be maintained as a class action.
3. Pending a hearing on the merits, enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendant and his successors, assigns, and agents from enforcing Section 207 of P.L. 97-459 escheating to the Tribes designated land in which Plaintiffs have an interest.
4. Enter a permanent injunction, pursuant to Rule 57 of the Federal Rules of Civil Procdure, enjoining the Defendant his successors, agents and assigns from escheating to the Tribe(s) the land of decedents of Plaintiffs and the class they seek to represent pursuant to Section 207 of P.L. 97-459.
5. Declare Section 207 of P.L. 97-459 unconstitutional and that said Section has no legal affect.
6. Grant Plaintiffs the costs of this suit and Attorney's fees.
7. Grant Plaintiffs such additional relief as equity deems necessary.

DATED: 10-20-83

Respectfully submitted,

/s/ Bette Bunker Richards
BETTE BUNKER RICHARDS
Attorney for Plaintiffs
DAKOTA PLAINS LEGAL SERVICES
PO Box 564
Batesland, South Dakota 57716
605-288-1890

## EXCERPTS FROM EXHIBIT A TO PLAINTIFFS' COMPLAINT

### INVENTORY OF INDIAN TRUST LANDS OF CHESTER IRVING, OS 8205

According to the records of the Pine Ridge Agency, Pine Ridge, South Dakota, CHESTER IRVING, at the time of his death on March 18, 1983, was possessed of the following interests in trust or restricted property on the Pine Ridge Reservation.

### PART I

Property *not* subject to provisions of Public Law 97-459

INHERITED INTERESTS:

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-68 | | NE¼ of Sec 33, Twp 36N., Rng-45W., 6th PM., | | | |
| Noah Janis | | Shannon County, SD., containing 160 acres M/L. | | | |
| 120-58 | | Estimated value: $9,600.00 | | | |
| | THRU: | Martha Janis, OS-63 (25348-44) | 2/27 | | |
| | | Eugene Irving, OSU-9747 (N-16-65) | 1/108 | | |
| | | AGGREGATING | 9/108 or .8333333 | $800.00 | $177.04 |
| OS-71 | | SE¼ of Sec 34, Twp-36N., Rng-43W., 6th PM., | | | |
| Antoine Janis | | Shannon County, SD., containing 160 acres M/L. | | | |
| N-41-67 | | Estimated value: $9,600.00 | | | |
| | THRU: | Direct | 1/48 or .02083333 | $200.00 | $ 22.39 |

| | | | | | |
|---|---|---|---|---|---|
| OS-2853<br>Adam Tobacco<br>11633-28 | | NE¼ of Sec 34, Twp-38N., Rng-46W., 6th PM.,<br>Shannon County, SD., containing 160 acres M/L.<br>Estimated value: $9,600.00 | | | |
| | THRU: | Ellen Irving-Tobacco, OS-17 (25382-44)<br>Eugene Irving, OSU-9747 (N-16-65)<br>AGGREGATING | 1/40<br>1/320<br>9/320 or<br>.0281250 | $270.00 | $ [blank] |
| OST-7632<br>Noah Shaving<br>Bear | | S½N½ of Sec 22, Twp-36N., Rng-45W., 6th PM.<br>Shannon County, SD., containing 160 acres M/L.<br>Estimated value: $9,600.00 | | | |
| | THRU: | Susie White Crow Irving (N-55-69) | 1/3 or<br>.3333333 | $3,200.00 | $ 0.00 |
| OST<br>Unallotted | | SE¼NE¼ of Sec 14, Twp-35N., Rng-37W., 6th PM.<br>Bennett County, SD., containing 40 acres M/L.<br>Estimated value: $3,200.00 | | | |
| | THRU: | Susie White Crow-Irving OS-5825 (N-55-69) | 1/3 or<br>.3333333 | $1,066.67 | $ 0.00 |
| OST<br>Unallotted | | W½SE¼ of Sec 3, Twp-35N., Rng-36W., 6th PM.<br>Bennett County, SD., containing 80 acres M/L.<br>Estimated value: $6,400.00 | | | |
| | THRU: | Susie White Crow-Irving, OS-5825 (N-55-69) | 1/3 or<br>.3333333 | $2,133.33 | $ 0.00 |

## PART II

**Property *subject* to provisions of Public Law 97-459**

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-72<br>Mary Janis<br>1370-19 | | SW¼ of Sec 34, Twp-36N., Rng-43W., 6th PM., Shannon county, SD., containing 160 acres M/L.<br>Estimated value: $9,600.00 | | | |
| | THRU: | Martha Janis, OS-63 (25384-44) | 1/810 | | |
| | | Eugene Irving, OSU-9747 (N-16-65) | 1/6840 | | |
| | | Antoine Janis, OS-71 (N-41-67) | 11/2880 | | |
| | | AGGREGATING | 1/192 or .0052083 | $50.00 | $ 5.35 |
| OS-6540<br>Millie B.<br>Tobacco | | SE¼ of Sec 25, & NE¼ of Sec 36, Twp-37n., Rng-45W., 6th PM., Shannon county, SD., containing 320 acres M/L.<br>Estimated value: $19,200.00 | | | |
| | THRU: | Ellen Irving-tobacco, OS-17 (25382-44) | 1/360 | | |
| | | Eugene Irving, OSU-9747 (N-16-65) | 1/2880 | | |
| | | AGGREGATING | 1/320 | $60.00 | $ 2.00 |
| | | TOTAL ESTIMATED VALUE OF THIS ESTATE | | $7,780.00 | $206.78 |



### CERTIFICATION

I certify that the foregoing is an accurate inventory, according to the records of the Pine Ridge Agency of the trust or restricted property or interests therein, owned by CHESTER IRVING at the time of death. The value shown in this inventory is an estimate and it does not necessarily represent the present market value of the property. Further investigations should be made before entering into any negotiations involving this property.

Done this 17th day of August, 1983, at Pine Ridge, South Dakota

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Realty Officer

## EXCERPTS FROM EXHIBIT C TO PLAINTIFFS' COMPLAINT

### INVENTORY OF INDIAN TRUST LANDS OF
Geraldine Mary Poor Bear-Little Hoop-Cross
OSU-16290

According to the records of the Pine Ridge Agency, Pine Ridge, South Dakota, Geraldine Mary Poor Bear-Little Hoop-Cross at the time of death on 3-23-83, was possessed of the following interests in trust or restricted property on the Pine Ridge Reservation.

### PART I

Property *not* subject to provisions of Public Law 97-459

INHERITED INTERESTS:

| Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| OS-5547<br>Levi<br>Plenty Bear<br>106122-15 THRU: | Lots 7, 8 W½NW¼ of Sec 33, Twp-40N., Rng-33W., 6th PM., Jackson county, SD. containing 144.28 acres M/L. Estimated value: $11,542.40<br>Harvey Raymond Little Hoop, OSU-16036 (L-162-61) | .2/45 or .0444444 | $513.00 | $13.21 |

## PART II

Property *subject* to provisions of Public Law 97-459

| INHERITED INTERESTS: Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| OS-1242<br>Looks At<br>White Cow<br>7673-18 THRU: | W½ of Sec 10, Twp-35N., Rng-45W., 6th PM.<br>Shannon County, SD., containing 320 acres M/L.<br>Estimated value: $19,200.00<br>Harvey Raymon Little Hoop, OSU-16036 (L-162-61) | 1/720 or<br>.00138888 | $ 26.66 | $ 0.68 |
| OS-4542<br>Charles<br>Little Hoop<br>4826-35 THRU: | NE¼ & SW¼ of Sec 8, Twp-37N., Rng-37W., 6th PM.<br>Bennett County, SD., containing 320 acres M/L.<br>Estimated value: $25,600.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/90 or<br>.0111111 | $284.44 | $31.80 |
| OS-4717<br>Bella Her<br>Many Horses<br>92582-20<br>THRU: | Lots 1, 2, 3, 4, & SE¼ of Sec 1, Twp-36N., Rng-35W.,<br>& Lot 1 of Sec 6, Twp-36N., Rng-34W., 6th PM.,<br>Bennett County, SD., containing 308.02 acres M/L.<br>Estimated value: $24,641.60<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/1440 or<br>.00069444 | $ 17.11 | $ 0.84 |
| OS-4999<br>Brown Wolf<br>32510-28<br>THRU: | SE¼ of Sec 5, Twp-39N, Rng-36W., 6th PM.<br>Bennett county, SD., containing 160 acres M/L.<br>Estimated value: $12,800.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 7/2250 or<br>.0031111 | $39.82 | $ 0.90 |

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|---|---|---|---|---|---|
| OS-5161<br>White Horse<br>Owner<br>21772-16 | THRU: | NW¼ of Sec 21, Twp-38N., Rng-38W., 6th PM., Bennett county, CD., containing 160 acres M/L. Estimated value: $12,800.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/60 or<br>.0166666 | $213.33 | $ 3.90 |
| OS-5300<br>Holy In Center<br>61900-29 | THRU: | N½ of Sec 11, Twp-38N., Rng-39W., 6th PM., Bennett county, SD, containing 320 acres M/L. Estimated value: $25,600.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/90 or<br>.0111111 | $284.44 | $ 6.12 |
| OS-5307<br>Makes Things<br>Good<br>72404-17 | THRU: | SW¼ & S½SE¼ of Sec 1 & NE¼NW¼; E½NW¼NW¼; E½SE¼NW¼ of Sec 12, Twp-38N., Rng-40W. 6th PM. Bennett county, SD. containing 320 acres M/L. Estimated value: $25,600.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/360 or<br>.0027777 | $71.11 | $ 2.02 |
| OS-5413<br>Takes Pity<br>On Them<br>79455-17 | THRU: | E½W½NW¼ of Sec 34; E½SE¼NE¼ of Sec 30; NW¼SW¼; W½NW¼; NE¼NW¼; N½SE¼NW¼; N½SW¼NE¼ of Sec 29; SW¼SW¼; W½SE¼SW¼ of Sec 20, Twp-39N., Rng-40W., 6th PM. Bennett county, SD. containing 320 acres M/L. Estimated value: $25,600.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/225 or<br>.0044444 | $113.78 | $51.10 |

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-5523<br>Joseph<br>Little Hoop<br>18375-33 | THRU: | SE¼ of Sec 34, Twp-40N., Rng-34W., 6th PM.<br>Jackson county, SD., containing 160 acres M/L.<br>Estimated value: $12,800.00<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 1/90 or<br>.0111111 | $142.22 | $ 3.20 |
| OS-1044<br>Sage<br>60553-15 | THRU: | NE¼ & E½NW¼ of Sec 21, Twp-37N., Rng-40W.,<br>6th PM. Shannon county, SD., containing<br>240 acres M/L. Estimated Value: None<br>100% MINERALS ONLY<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 17/1831 or<br>.0092845 | $0.00 | $0.00 |
| OS-1325<br>Spotted Crow<br>67140-14 | THRU: | N½ of Sec 25, Twp-39N., Rng-41W., 6th PM.<br>Shannon county, SD., containing 320 acres M/L.<br>Estimated value: NONE 100% MINERALS ONLY<br>Harvey Little Hoop, OSU 16036- (L-162-61) | 1/270 or<br>.0037037 | $0.00 | $0.00 |
| OS-1444<br>Cut Foot<br>74856-21 | THRU: | SW¼NW¼ of Sec 21, Twp-37N., Rng-40W., 6th PM.<br>Bennett county, SD., containing 40 acres M/L.<br>Estimated value: NONE 100% MINERALS ONLY<br>Harvey Little Hoop, OSU-16036 (L-162-61) | 17/1831 or<br>.0092845 | $0.00 | $0.00 |

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|---|---|---|---|---|
| OS-4247 | SW¼ of Sec 1, Twp-40N., Rng-35W., 6th PM. | | | |
| Henry Richard | Jackson county, SD., containing 160 acres M/L. | | | |
| | Estimated value: NONE 100% MINERALS ONLY | | | |
| THRU: | Harvey Little Hoop, OSU-16036 (L-162-61) | 17/1831 or .0092845 | $0.00 | $0.00 |
| OS-4578 | S½ of Sec 27, Twp-37N., Rng-37W., 6th PM. | | | |
| Kills Enemy | Bennett county, SD., containing 320 acres M/L. | | | |
| 57470-21 | Estimated value: NONE 100% MINERALS ONLY | | | |
| THRU: | Harvey Little Hoop, OSU-16036 (162-61) | 1/360 or .0027777 | $0.00 | $0.00 |
| OS-1191 | SW¼NE¼ of Sec 11, Twp-37N., Rng-40W., 6th PM. | | | |
| James | Bennett county, SD., containing 40 acres M/L. | | | |
| Yellow Horse | Estimated value: NONE 100% MINERALS ONLY | | | |
| 51513-34 THRU: | Harvey Little Hoop, OSU-16036 (L-162-61) | 17/1831 or .0092845 | $0.00 | $0.00 |
| | TOTAL ESTIMATED VALUE OF THIS ESTATE | | $1,705.91 | |



## CERTIFICATION

I certify that the foregoing is an accurate inventory, according to the records of the Pine Ridge Agency of the trust or restricted property or interests therein, owned by Geraldine Mary PoorBear-Cross OSU-16290 at the time of death. The value shown in this inventory may be an estimate and it does not necessarily represent the present market value of the property. Further investigations should be made before entering into any negotiations involving this property.

Done this 19th day of August, 1983, at Pine Ridge, South Dakota.

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Realty Officer

## INVENTORY OF INDIAN TRUST LANDS OF GERALDINE MARY POOR BEAR/CROSS/KILLS CROW INDIAN OGLALA SIOUX UNALLOTTED 16290

According to the records of the Rosebud Agency, Rosebud, South Dakota, GERALDINE MARY POOR BEAR/CROSS/KILLS CROW INDIAN, at the time of her death on March 23, 1983, was possessed of the following interests in trust or restricted property on the Rosebud Reservation.

INHERITED INTERESTS:

| Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| RS-728<br>Etta<br>Eagle Dog<br>58615-19 | NW¼, Sec. 9, T.41N., R.29W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | |
| THRU<br>Supra. | Raymond H. Little Hoop, OSU-16036 (L-162-61) | 1/540 or<br>0.0018518518 | $ 41.48 | $ .89 |
| RS-855<br>Pipe<br>78916-19<br>25403-21 | SE¼, Sec. 33, T.43N., R.26W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | |
| Supra. | | 2/175 or<br>0.0114285714 | $ 256.00 | $ 7.97 |
| RS-856<br>Good Road<br>or Foggy<br>78917-19<br>25404-21 | SE¼, Sec. 22 & SW¼, Sec. 33, All in T.43N., R.26W., 6th P.M., South Dakota, containing 320.00 acres, more or less.<br>Estimated value: $44,800.00 | | | |
| Supra. | | 1/75 or<br>0.0133333333 | $ 597.33 | $ 6.41 |

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|---|---|---|---|---|---|
| RS-896<br>Mary<br>Red Eyes<br>7096-16 | NE¼, Sec. 22, T.39N., R.30W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | | |
| Supra. | | 1/405 or<br>0.0024691358 | $ 55.31 | $ .83 | |
| RS-1546½<br>Jennie<br>Knife<br>108823-19 | NE¼, Sec. 28, T.41N., R.29W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | | |
| Supra. | | 2/405 or<br>0.0049382716 | $ 110.62 | $ 5.98 | |
| RS-1556<br>Louis<br>Bear Heels<br>58614-18 | NE¼, Sec. 16, T.42N., R.30W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | | |
| Supra. | | 1/270 or<br>0.0037037037 | $ 82.96 | $ 1.77 | |
| RS-1999<br>Black Bull<br>108548-15<br>86994-16 | SW¼, Sec. 5, T.39N., R.29W., 6th P.M., South Dakota, containing 160.00 acres, more or less.<br>Estimated value: $22,400.00 | | | | |
| Supra. | | 7/10935 or<br>0.0006401463 | $ 14.34 | $ .25 | |
| RS-2005½<br>Holy Door<br>Julia Knife<br>28374-29 | Lots 6, 7, E½SW¼, Sec. 6, T.40N., R.30W., 6th P.M. South Dakota, containing 152.98 acres, more or less.<br>Estimated value: $21,417.20 | | | | |
| Supra. | | 1/270 or<br>0.0037037037 | $ 79.32 | $ 2.15 | |
| RS-2545½<br>Lucy Yellow<br>Bird<br>80033-20 | S½, Sec. 26, T.44N., R.31W., 6th P.M., South Dakota, containing 320.00 acres, more or less.<br>Estimated value: $44,800.00 | | | | |
| Supra. | | 2/405 or<br>0.0049383 | $ 221.23 | $ 7.31 | |

INHERITED INTERESTS:

| Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| RS-4099<br>Yellow<br>Hawk<br>83240-15<br>Supra. | Lots 1, 2 & S½NE¼, Sec. 3, T.42N., R.31W. & SW¼, Sec. 15, T.40N., R.29W., 6th P.M., South Dakota, containing 320.12 acres, more or less. Estimated value: $44,816.80 | 1/3645 or 0.0002743484 | $ 12.30 | $ .35 |
| RS-4099½<br>Eagle<br>Feather<br>36779-27<br>Supra. | S½, Sec. 10, T.40N., R.29W., 6th P.M., South Dakota, containing 320.00 acres, more or less. Estimated value: $44,800.00 | 1/1215 or 0.0008230452 | $ 36.87 | $ 1.18 |
| | TOTAL ESTIMATED VALUE OF THIS ESTATE | | $1,507.76 | $35.09 |

CERTIFICATION

I CERTIFY that the foregoing is an accurate inventory, according to the records of the Rosebud Agency of the trust or restricted property or interests therein, owned by GERALDINE MARY POOR BEAR/CROSS/KILLS CROW INDIAN at the time of her death. The value shown in this inventory may be an estimate and it does not necessarily represent the present market value of the property. Further investigations should be made before entering into any negotiations involving this property.

Done this 12th day of April, 1983 at Rosebud, South Dakota.

/s/ Hubert C. McCloskey
HUBERT MCCLOSKEY
Realty Officer

## EXCERPTS FROM EXHIBIT E TO PLAINTIFFS' COMPLAINT

### INVENTORY OF INDIAN TRUST LANDS OF EDGAR PUMPKIN SEED, OSU-11081

### PART I

According to the records of the Pine Ridge Indian Agency, Pine Ridge, South Dakota, EDGAR PUMPKIN SEED, OSU-11081, at the time of death on June 23, 1983, was possessed of the following trust property on the Pine Ridge Reservation.

| INHERITED INTERESTS: Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| OS-670 Garter 149650-16 | Lots 3, 4, E½SW¼, SE¼ Sec. 30, T-40N, R-42W., 6th P.M., Shannon County, South Dakota, containing 324.24 acres, more or less. Estimated Value: $19,454.40 | 1/36 or .0277777 | $ 540.40 | $ 13.37 |
| THRU | Eagle Shield, OS-671 (16145-33) 1/54<br>John Pumpkin Seed, OS-682 (N-43-66) 1/108 | | | |
| OS-671 Eagle Shield 16145-33 | Lots 1, 2, W½NE¼, NW¼ Sec. 24, T-38N., R-43W., 6th P.M., Shannon County, South Dakota, containing 315.78 acres, more or less. Estimated Value: $18,946.80 | 1/12 or .0833333 | $1,578.90 | $ 53.57 |
| THRU | Eagle Shield, OS-671 (16145-33) 1/18<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| OS-675 Louisa Eagle Shield 81538-16 | Lots 1, 2, E½NW¼ Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 176.10 acres, more or less. Estimated Value: $10,566.00 | 1/12 or .0833333 | $ 880.50 | $ 26.54 |

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| | THRU | Eagle Shield, OS-671 (16145-33) 1/27<br>Helen Eagle Shield, OS-7208 (16144-33) 1/54<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| OS-672<br>Lucy<br>Eagle<br>Shield<br>42912-14 | | N½ Sec. 17, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $19,200.00 | 1/18 or<br>.0555555 | $1,066.67 | $ 32.28 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/18 | | | |
| OS-673<br>Luke<br>Eagle<br>Shield<br>42911-14 | | NE¼ Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 160 acres more or less.<br>Estimated Value: $9,600.00 | 1/12 or<br>.0833333 | $ 800.00 | $ 24.14 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/18<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| OS-676-A<br>Annie Eagle<br>Shield<br>42910-14 | | Lot 4, E½SW¼ Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 127.57 acres, more or less.<br>Estimated Value: $7,654.20 | 1/12 or<br>.0833333 | $ 637.85 | $ 14.48 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/18<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |

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|---|---|---|---|---|
| OS-676-B<br>Annie Eagle Shield<br>42910-14 | Lot 3, Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 47.77 acres, more or less.<br>Estimated Value: $2,866.20 | 1/6 or .1666666 | $ 477.70 | $ 19.31 |
| THRU | Helen Eagle Shield, OS-7208 (16144-33) 1/9<br>John Pumpkin Seed, OS-682 (N-43-66) 1/18 | | | |
| OS-7207<br>Mary Eagle Shield<br>4877-28 | W½ Sec. 34, T-43N., R-37W., 6th P.M., Jackson County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $25,600.00 | 1/12 or .0833333 | $2,133.33 | $ 39.70 |
| THRU | Eagle Shield, OS-671 (16145-33) 1/54<br>Helen Eagle Shield, OS-7208 (16144-33) 1/27<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| | ESTIMATED VALUE | | $8,115.35 | $223.39 |

## PART II

Property *subject* to provisions of Public Law 97-459

INHERITED INTERESTS:

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-678<br>Asa<br>Pumpkin<br>Seed<br>8247-55 | | SE¼ Sec. 35, T-40N., R-43W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $9,600.00 | 1/64 or .0156250 | $ 150.00 | $ 5.16 |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |
| OS-1263<br>Mary Ice<br>52046-15 | | Lots 1, 2, 3, 4, S½NE¼, S½NW¼, Sec. 1, T-39N., R-41W., 6th P.M., Shannon County, South Dakota, containing 320.52 acres, more or less.<br>Estimated Value: $19,231.20 | 1/256 or .0039062 | $ 75.12 | $ 2.28 |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/256 | | | |
| OS-5749<br>Jennie<br>Pumpkin<br>Seed<br>82783-23 | | S½NE¼NE¼ Sec. 28, T-40N., R-42W., 6th P.M., Jackson County, South Dakota, containing 20 acres, more or less.<br>Estimated Value: $1,600.00 | 1/64 or .0156250 | $ 25.00 | $ .76¢ |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |

| | | | | | |
|---|---|---|---|---|---|
| OS-7208<br>Helen<br>Eagle<br>Shield<br>16144-33 | | Lot 1, SE¼NE¼, E½SE¼ Sec. 21 & Lot 2 Sec. 23, T-43N., R-37W., 6th P.M., Jackson County, South Dakota, containing 165.90 acres, more or less.<br>Estimated Value: $13,272.00 | 1/6 or .1666666 | $2,212.00 | $ 42.28 |
| | THRU | Helen Eagle Shield, OS-7208 (16144-33) 1/9<br>John Pumpkin Seed, OS-682 (N43-66) 1/18 | | | |
| OS-7676<br>Bessie Emily<br>Pumpkin Seed<br>119816-16 | | NW¼ Sec. 14, T-40N., R-43W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $9,600.00 | 1/64 or .0156250 | $ 150.00 | $ 4.50 |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |
| | | ESTIMATED VALUE | | $3,292.12 | $ 54.98 |
| | | TOTAL ESTIMATED VALUE OF THIS ESTATE | | $11,407.47 | $278.37 |



CERTIFICATION

I certify that the foregoing is an accurate inventory, according to the records of the Pine Ridge Agency, of the trust or restricted property or interests therein, owned by EDGAR PUMPKIN SEED, OSU-11081, at the time of his death. The value shown in this inventory may be an estimate and it does not necessarily represent the present market value of the property. Further investigations should be made before entering into any negotiations involving this property.

Done this 19th day of August, 1983 at Pine Ridge, South Dakota.

/s/ Frieda M. Brewer
Acting
Realty Officer

## EXCERPTS FROM EXHIBIT F TO PLAINTIFFS' COMPLAINT

INVENTORY OF INDIAN TRUST LANDS OF
CHARLES LEROY PUMPKIN SEED, OSU-10179

PART I

According to the records of the Pine Ridge Indian Agency, Pine Ridge, South Dakota, CHARLES LEROY PUMPKIN SEED, OSU-10179, at the time of death on April 2, 1983, was possessed of the following trust property on the Pine Ridge Reservation.

| INHERITED INTERESTS: Allotment | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|
| OS-675<br>Louisa Eagle Shield<br>81538-16 | Lots 1, 2, E½NW¼, Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 176.10 acres, more or less.<br>Estimated Vaiue: $10,566.00 | 1/12 or .0833333 | $ 880.50 | $ 26.54 |
| THRU | Eagle Shield, OS-671, (16145-33) 1/27<br>Helen Eagle Shield, OS-7208, (16144-33) 1/54<br>John Pumpkin Seed, OS-682, (N-43-66) 1/36 | | | |
| OS-7208<br>Helen Eagle Shield<br>16144-33 | Lot 1, SE¼NE¼, S½SE¼, Sec. 18, & Lot 2, Sec. 23, T-43N., R-47W., 6th P.M., Jackson County, South Dakota, containing 165.90 acres, more or less.<br>Estimated Value: $13,272.00 | 1/6 or .1666666 | $2,212.00 | $ 42.29 |
| THRU | Helen Eagle Shield, OS-7208 (16144-33) 1/9<br>John Pumpkin Seed, OS-682 (N-43-66) 1/18 | | | |

| | | | | | |
|---|---|---|---|---|---|
| OS-7207<br>Mary Eagle<br>Shield<br>4877-74 | | W½ Sec. 34, T-43N., R-37W., 6th P.M., Jackson County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $25,600.00 | 1/12 or<br>.0833333 | $2,133.33 | $ 39.70 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/54<br>Helen Eagle Shield, OS-7208 (16144-33) 1/27<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| OS-670<br>Garter<br>119650-16 | | Lots 3, 4, NE¼SW¼, SE¼SW¼, SE¼ Sec. 30, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 324.24 acres, more or less.<br>Estimated Value: $19,454.40 | 1/36 or<br>.0277777 | $ 540.40 | $ 13.37 |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/108<br>Eagle Shield, OS-671 (16145-33) 1/54 | | | |
| OS-673<br>Luke Eagle<br>Shield<br>42911-14 | | NE¼ Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $9,600.00 | 1/12 or<br>.0833333 | $ 800.00 | $ 24.13 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/18<br>John Pumpkin Seed, OS-682 (N-43-66) 1/36 | | | |
| OS-676<br>Annie Eagle<br>Shield<br>42910-14 | | Lot 3, Sec. 18, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 47.77 acres, more or less.<br>Estimated Value: $2,866.20 | 1/6 or<br>.1666666 | $ 477.70 | $ 14.48 |
| | THRU | Helen Eagle Shield, OS-7208 (16144-33) 1/9<br>John Pumpkin Seed, OS-682 (N-43-66) 1/18 | | | |

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-672<br>Lucy Eagle Shield<br>42912-14 | | N½ Sec. 17, T-38N., R-42W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $19,200.00 | 1/18 or .0555555 | $1,066.67 | $ 32.28 |
| | THRU | Eagle Shield, OS-671 (16145-33) 1/18 | | | |
| OS-6933<br>Jasper Scout<br>16338-55 | | S½ Sec. 5, T-41N., R-33W., 6th P.M., Jackson County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $25,600.00 | 1/96 or .0104166 | $ 266.66 | $ 6.75 |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/96 | | | |
| OS-196<br>Charles Shot<br>1912-56 | | NW¼ Sec. 28, T-37N. R-43W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $9,600.00 | 1/36 or .0277777 | $ 266.67 | -0- |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/36 | | | |
| | | ESTIMATED VALUE | | $8,643.93 | $199.54 |

## PART II

Property *subject* to provisions of Public Law 97-459

**INHERITED INTERESTS:**

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-6923<br>Stella<br>Scout<br>116630-15 | | NE¼ Sec. 32, T-42N., R-34W., 6th P.M., Jackson County, South Dakota, containing 160 acres, more or less.<br>Estimated Value: $12,800.00 | 1/96 or<br>.0104166 | $ 133.33 | $ 3.03 |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/96 | | | |
| OS-678<br>Asa<br>Pumpkin<br>Seed<br>8247-55 | | SE¼ Sec. 35, T-40N., R-43W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less<br>Estimated Value: $9,600.00 | 1/64 or<br>.0156250 | $ 150.00 | $ 5.15 |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |
| OS-1263<br>Mary Ice<br>32046-15 | | Lots 1, 2, 3, 4, S½NE¼, S½NW¼, Sec. 1, T-39N., R-41W., 6th P.M., Shannon County, South Dakota, containing 320.52 acres, more or less.<br>Estimated Value: $19,231.00 | 1/256 or<br>.0039062 | $ 75.12 | $ -0- |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/256 | | | |
| OS-5749<br>Jennie<br>Pumpkin<br>Seed<br>82783-23 | | S½NE¼NE¼ Sec. 28, T-40N., R-42W., 6th P.M., Shannon County, South Dakota, containing 20 acres, more or less.<br>Estimated Value: $1,200.00 | 1/64 or<br>.0156250 | $ 18.75 | .76¢ |
| | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |

| Allotment | | Description | Share & Decimal Equivalency | Est. Value | Income for Preceding Year |
|---|---|---|---|---|---|
| OS-7676<br>Bessie<br>Emily<br>Pumpkin<br>Seed | | NW¼ Sec. 14, T-40N., R-43W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or lses.<br>Estimated Value: $9,600.00 | 1/64 or<br>.0156250 | $ 150.00 | $ 4.50 |
| 119816-16 | THRU | John Pumpkin Seed, OS-682 (N-43-66) 1/64 | | | |
| OS-168<br>David<br>Shot<br>77561-36 &<br>61365-35 | | E½ Sec. 28, T-37N., R-43W., 6th P.M. Shannon County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $19,200.00 | 1/72 or<br>.01388888 | $ 266.66 | $ 9.94 |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/72 | | | |
| OS-1122<br>Jasper<br>Scout<br>16338-55 | | S½ Sec. 15, T-37N., R-40W., 6th P.M., Bennett County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $25,600.00 | 1/96 or<br>.0104166 | $ 266.66 | -0- |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/96 | | | |
| OS-1123<br>Alice<br>Scout<br>60799-15 | | N½ Sec. 22, T-37N., R-40W., 6th P.M., Bennett County, South Dakota, containing 320 acres, more or less.<br>Estimated Value: $25,600.00 | 1/288<br>.0034722 | $ 88.89 | -0- |
| | THRU | Winona Pumpkin Seed, OSU-10414 (N-30-68) 1/288 | | | |

| | | |
|---|---|---|
| ESTIMATED VALUE | $1,149.41 | $ 23.28- |
| TOTAL ESTIMATED VALUE OF THIS ESTATE | $9,793.34 | $222.92 |

CERTIFICATION

I certify that the foregoing is an accurate inventory, according to the records of the Pine Ridge Agency of the trust or restricted property or interests therein, owned by CHARLES LEROY PUMPKIN SEED, OSU-10179, at the time of his death. The value shown in this inventory may be an estimate and it does not necessarily represent the present market value of the property. Further investigations should be made before entering into any negotiations involving this property.

Done this 19th day of August, 1983 at Pine Ridge, South Dakota.

/s/ Frieda M. Brewer
Acting
Realty Officer

SUPREME COURT OF THE UNITED STATES

---

No. 85-637

DONALD P. HODEL, SECRETARY OF THE INTERIOR, APPELLANT

*v.*

MARY IRVING, ET AL.

---

Appeal from the United States Court of Appeals for the Eighth Circuit

---

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 13, 1986

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Supreme Court, U.S.
FILED
APR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-637

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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DONALD P. HODEL, SECRETARY OF THE INTERIOR,
APPELLANT

*v.*

MARY IRVING, ET AL.

---

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE APPELLANT

---

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## QUESTIONS PRESENTED

1. Whether Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe concerned, results in a taking of private property without the payment of just compensation, in violation of the Fifth Amendment to the Constitution.

2. Whether the court of appeals erred in holding that the amended version of Section 207 of the Indian Land Consolidation Act that was enacted in 1984, 25 U.S.C. (Supp. II) 2206, also is unconstitutional, even though the amended version does not apply to any of the interests in allotments that were owned by appellees' decedents.

## PARTIES TO THE PROCEEDING

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross (J.A. 11). The appellees sought to represent a class of all heirs and potential heirs of persons dying possessed of lands subject to escheat under Section 207 of the Indian Land Consolidation Act of 1983 (J.A. 11-12). However, the district court sustained the constitutionality of Section 207 without passing on the motion for class certification, and it accordingly denied the motion for class certification as moot (J.S. App. 26a).

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-637

DONALD P. HODEL, SECRETARY OF THE INTERIOR, APPELLANT

*v.*

MARY IRVING, ET AL.

---

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE APPELLANT

---

### OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-17a) is reported at 758 F.2d 1260. The opinion of the district court (J.S. App. 21a-25a) is unreported.

### JURISDICTION

The judgment of the court of appeals (J.S. App. 18a) was entered on March 29, 1985, and the petition for rehearing was denied on June 6, 1985 (J.S. App. 19a). The notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on July 2, 1985 (J.S. App. 20a). By order dated August 29, 1985, Justice Blackmun extended the time within which to docket the appeal to and including October 15, 1985, and the jurisdictional statement was filed on that date. Probable jurisdiction was noted on January 13, 1986

(J.A. 40). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution; Section 207 of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2519, 25 U.S.C. 2206; the amended version of Section 207 of the Indian Land Consolidation Act enacted in Pub. L. No. 98-608, 98 Stat. 3173, 25 U.S.C. (Supp. II) 2206; and Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, are reproduced at App., *infra*, 1a-3a.

## STATEMENT

This case concerns the constitutionality of Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. (Supp. II) 2206, which was enacted to address the numerous problems created by the increasingly fractionated ownership of Indian allotments. Section 207 provides for the escheat to the tribe concerned of certain de minimis undivided fractional interests in allotments upon the death of the owner of such an interest. The court of appeals held that Section 207, both as enacted in 1983 and as amended in 1984, results in a taking of private property without payment of just compensation, in violation of the Fifth Amendment to the Constitution.

### A. Historical Background

1. The allotment policy commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, which was followed by a number of statutes providing for the allotment of land on individual Indian reservations. See *Solem* v. *Bartlett*, 465 U.S. 463, 466-468 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The particular statute involved here, the Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, provided for the division of the Great Reservation of the Sioux

Nation into separate reservations and the allotment of land on those reservations to individual Indians.

Under the allotment Acts, each member of the tribe typically received a parcel of 160, 80, or 40 acres, depending upon his marital status and age and the type of land involved. The remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, § 1, 24 Stat. 388. This pattern was followed in the Sioux statute. § 8, 25 Stat. 890. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that an allotted parcel was to be held in trust by the United States for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389; 25 Stat. 891. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980).

The allotment policy ultimately was repudiated by Congress in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976); *Mattz* v. *Arnett*, 412 U.S. at 496 n.18. In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the trust or restricted period of then-existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)).

2. The length of the period during which allotments were to be held in trust made it necessary for Congress to provide for the disposition of an allotted parcel upon the death of the original allottee. Accordingly, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located" (24 Stat. 389,

25 U.S.C. 348; 25 Stat. 891). These statutory provisions had the effect, insofar as allotted lands were concerned, of preempting the inherent right of an Indian tribe to regulate the descent and distribution of the property of its members. *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899). See F. Cohen, *Handbook of Federal Indian Law* 139 (1942).

In Section 1 of the Act of June 25, 1910, ch. 431, 36 Stat. 855, Congress directed the Secretary of the Interior to ascertain the heirs of a person for whom an allotment was held in trust and who died without making a will disposing of the allotment.[1] In Section 2 of the same Act (36 Stat. 856), Congress also authorized any person age 21 or older who had an interest in a trust or restricted allotment to dispose of that interest by will, in accordance with regulations prescribed by the Secretary of the Interior. *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970); *Blanset* v. *Cardin*, 256 U.S. 319, 325-327 (1921).[2] These statutory provisions remain in effect. See 25 U.S.C. 372, 373. As a matter of practice under them, when the original allottee died, each of his heirs or devisees received an undivided fractional interest in the whole allotment. Each such fractional interest in turn was further

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[1] Congress further provided that if the Secretary determined that the heirs of the decedent were competent to manage their own affairs, he was to issue them a fee patent to the allotment; if he decided that one or more of the heirs was incompetent, he was authorized to cause the allotted lands to be sold or partitioned, with the proceeds or land transferred to competent heirs and held in trust for incompetent heirs. Similar provisions had been enacted in the Act of May 8, 1906, ch. 2348, 34 Stat. 182 *et seq.*, and Section 1 of the Act of May 29, 1908, ch. 216, 35 Stat. 444.

[2] Section 2 of the 1910 Act was amended by the Act of Feb. 14, 1913, ch. 55, 37 Stat. 678 *et seq.*, to apply to restricted property other than allotted lands. *Tooahnippah* v. *Hickel*, 397 U.S. at 606. The right to dispose of property by will previously had been granted to members of the Five Civilized Tribes by the Act of Apr. 26, 1906, ch. 1876, § 23, 34 Stat. 145. See *Blundell* v. *Wallace*, 267 U.S. 373 (1925).

subdivided upon the death of the heir or devisee who owned it. As a result, after several generations, ownership of individual allotments often became extremely fragmented.

The problems associated with this trend toward fractionated ownership were explored at least as early as 1928, in the Meriam Report,[3] and in 1942 by Felix Cohen, in his *Handbook of Federal Indian Law*, *supra*, at 229-230. Congress also was aware when it enacted the IRA in 1934 that the multiplication of the heirs of deceased allottees frequently had caused ownership of allotted lands to become so subdivided that their use by Indians or their rental to non-Indians had been rendered impossible. S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Such lands were often sold to the highest bidder, "practically always to whites" (*ibid.*), with the result that much of the land necessary to support the Indians had passed out of Indian ownerhip. See 78 Cong. Rec. 11727-11728 (1934) (remarks of Rep. Howard). The allotment system thus was bringing about a "complete economic disintegration" on reservations (*ibid.*). Even where allotments in heirship status were not sold, the cost of administering the allotted lands on behalf of numerous individual heirs often was far out of proportion to the income generated by the land.[4]

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[3] L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40-41 (1928).

[4] Representative Howard, one of the sponsors of the IRA, explained (78 Cong. Rec. 11728 (1934)):

> It is in the case of the inherited allotments, however, that the administrative costs become incredible. * * * On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in

The IRA addressed certain of these problems created by the allotment system. As mentioned above, Section 1 of the IRA prohibited further allotments of reservation land. Moreover, in Section 4 of the IRA, 25 U.S.C. 464, Congress confined the descent or devise of restricted lands to the tribe itself, members of the tribe, heirs or lineal descendants of the decedent,[5] and other Indians for whom the United States may hold land in trust. This provision was intended to "make[] a beginning in the solution of the inherited-land problem." H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934).[6]

Thereafter, by the Act of Nov. 24, 1942, ch. 640, 56 Stat. 1021 *et seq.*, Congress provided that if an Indian holder of trust or restricted lands or an interest therein has died intestate without heirs, the lands or interest, together with accumulated rents, issues or profits, "shall escheat to the tribe owning the land at the time of allotment" or to a successor tribe. 25 U.S.C. 373a. See H.R. Rep. 523, 77th Cong., 1st Sess. (1941); S. Rep. 1355, 77th Cong., 2d Sess. (1942).

Although the statutory measures just discussed served to stem the passage into non-Indian hands of Indian allotments that were held in heirship status, they did not

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which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.

[5] See 54 Interior Dec. 584 (1934).

[6] As introduced, the IRA bill provided that interests in allotted lands could not pass by intestacy or devise but instead would pass to the tribe concerned. Under this proposal, an individual otherwise entitled to the land would have acquired a contingent interest, which would vest in him only if the land were found by the Secretary to lie outside an area classified for land consolidation. If the contingent interest did not vest, the individual would have received a certificate reflecting a proportionate interest in tribal lands. H.R. 7902, 73d Cong., 2d Sess. § 11 (1934). This provision, which would have transformed all interests (not merely de minimis fractional interests) in allotted lands into tribal property, was not enacted. See 78 Cong. Rec. 12164-12165 (1934).

address the substantial problems resulting from fractionated ownership of allotments that remained in trust or restricted status. Comprehensive studies of these problems were conducted in 1960 by the responsible committees in both the House and Senate.[7] See generally S. Rep. 98-632, 98th Cong., 2d Sess. 3 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 712-719 (1971) [hereinafter cited as *Too Little Land*]. By 1960, one-half of the approximately 12 million acres of trust or restricted allotments was held by more than one heir, and one-half of that total in turn was held by more than six heirs. There were numerous examples in which 20 or 30 heirs held undivided interests in a single tract, and instances of more than 100 co-owners were not unheard of. See S. Rep. 98-632, *supra*, at 3; *Too Little Land* 712; *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 13-14 (1966) [hereinafter cited as *1966 Hearings*].[8]

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[7] Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960); House Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960).

[8] A number of bills were introduced in the 1950s and 1960s to address the fractionated ownership problem in a comprehensive manner, but none was enacted. See, *e.g.*, S. 2397, 85th Cong., 1st Sess. (1957); H.R. 5676, H.R. 6569, H.R. 8077, S. 1392, 87th Cong., 1st Sess. (1961); S. 2899, 87th Cong., 2d Sess. (1962); H.R. 5464, S. 1049, 88th Cong., 1st Sess. (1963); H.R. 11113, 89th Cong., 1st Sess. (1965); H.R. 10560, 90th Cong., 1st Sess. (1967); S. 522, 91st Cong., 1st Sess. (1969).

Statutes were enacted over the years to address land ownership problems on particular reservations, typically for the purpose of limiting the descent of property to members of the tribe. See, *e.g.*, Act of Feb. 27, 1925, ch. 359, § 7, 43 Stat. 1011, 25 U.S.C. 331 note (Osage Indians); Act of Aug. 9, 1946, ch. 933, § 7, 60 Stat. 969 (Yakima Tribe); Act of Aug. 10, 1972, Pub. L. No. 92-377, 86 Stat. 530 *et seq.* (Warm Springs Tribe); Act of Sept. 29, 1972, Pub. L.

In 1984, the Senate Select Committee on Indian Affairs identified the following consequences of the fractionated land ownership pattern (S. Rep. 98-632, *supra*, at 3):

> (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA [Bureau of Indian Affairs] because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indians or non-member Indians, (6) inability to control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

In addition, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts are left in a state of quasi-abandonment because of difficulties experienced by the BIA in obtaining agreement of the owners to lease the land. H.R. Rep. 97-908, 97th Cong., 2d Sess. 10-11, 13 (1982).

By the same token, from the BIA's perspective, the fractionated ownership creates substantial administrative problems by increasing the number of recordings required to maintain official land records, the number of probate proceedings to be examined in determining current title status, and the amount of work involved in responding to inquiries concerning family histories in connection with the ownership of undivided interests.

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No. 92-443, 86 Stat. 744 *et seq.* (Nez Perce Tribe); Act of Apr. 18, 1978, Pub. L. No. 95-264, 92 Stat. 202, 25 U.S.C. 463d note (Umatilla Reservation); Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537 *et seq.* (Standing Rock Sioux Reservation). Section 7 of the Yakima legislation, 25 U.S.C. 607, was the heirship provision upheld in *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966).

S. Rep. 98-632, *supra*, at 3. The computation of large common fractions for determining the ownership of undivided interests also has become far more complicated. *Ibid.* Indeed, the cost of maintaining such records often far exceeds the income realized from the fractional interest. See F. Cohen, *supra*, at 229; *1966 Hearings* 12-16; *Too Little Land* 718 n.42; *To Amend the Indian Land Consolidation Act of 1983: Hearing on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 6-8 (1984) [hereinafter cited as *1984 Hearing*]; M. Lawson, *Heirship: The Indian Amoeba* (1982), *reprinted in Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 76-104 (1984).

**B. The Statutory Scheme**

1. Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 to address the problems that are created by this increasingly fractionated ownership of allotments in heirship status. As originally enacted, Section 207 provided that an undivided interest in trust or restricted land within a tribe's reservation or subject to its jurisdiction that represents 2% or less of the total acreage of the tract and has earned its owner less than $100 in the preceding year shall not descend by intestacy or devise, but instead shall escheat to the tribe. 25 U.S.C. 2206. This provision addresses the extremes of the problem by preventing the descent (and the resulting further fractionation of ownership) of interests in an allotment that already are "so small as to be financially meaningless" (H.R. Rep. 97-908, *supra*, at 11).

Section 207 does not, however, affect the rights of the owner of such an interest, during his lifetime, to receive his share of the income from the property or to exercise any other incidents of ownership, such as the right to use the land in a manner consistent with the rights of other owners of undivided interests in the tract. In addition, the Secretary's instructions concerning the implementation of Section 207 (see J.S. App. 37a-40a) make

clear that the owner of a de minimis interest may avoid escheat by purchasing sufficient additional interests in the allotment from other co-owners so that his ownership share in the overall tract will exceed the 2% (or $100) level that avoids escheat (see 25 C.F.R. 151.7) or by conveying his interest to co-owners or to his relatives pursuant to 25 C.F.R. 152.25, perhaps reserving a life estate for himself.[9] A further option, if feasible, would be for the owner to apply to the Secretary for a partition of the tract to increase his ownership share. See 25 C.F.R. 152.33. See J.S. App. 39a-40a.

2. In October 1984, Congress revised Section 207 to provide still further alternatives to escheat. See Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*; J.S. App. 32a-36a.

First, Congress relaxed the standards that trigger automatic escheat under the statute. Instead of looking only to the income received in the year prior to the owner's death, as under the original version, the amended version of Section 207 provides: (i) that an interest in an allotment will escheat to the tribe if it represents 2% or less of the total acreage and is incapable of earning $100 in any one of the five years *after* the decedent's death, and (ii) that the failure of the interest to earn the decedent at least $100 in any one of the five years prior to his death gives rise only to a rebuttable presumption that it is incapable of earning $100 in any one of the five years after his death.[10] These changes were intended to account for the possibility that the income in

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[9] Of course, if the transferee's total interests in the tract do not satisfy the 2% or $100 test upon *his* death, the transferee's interest will escheat to the tribe pursuant to 25 U.S.C. 2206, unless he takes similar measures to avoid escheat.

[10] Read literally, this provision would seem to require an interest to earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. E4408 (daily ed. Oct. 10, 1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with this congressional intent.

the year immediately prior to the owner's death might have been abnormally low or that the receipt of little or no income did not accurately reflect the true value of the interest because the parcel contained valuable mineral or timber resources that were not exploited during the period in which income was measured. S. Rep. 98-632, *supra*, at 7, 12; *1984 Hearing* 8, 17, 20, 26, 32, 33, 74-78; *Amendments to the Indian Land Consolidated Act: Hearing on H.R.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 8, 29, 31, 37 (1983) [hereinafter cited as *1983 Hearing*].

Second, a new Subsection (b) provides that Section 207 does not prohibit the owner of an otherwise escheatable interest from devising it to the owner of another fractional interest in the same tract. This exception serves the statutory goal of consolidating fractional interests, while at the same time permitting the owner of such an interest to ensure that it will remain in individual rather than tribal ownership after his death. S. Rep. 98-632, *supra*, at 12.

Third, a new Subsection (c) permits a tribe, with the approval of the Secretary, to adopt its own code to govern the disposition of interests that otherwise would be subject to escheat under Section 207, so long as the code accomplishes the statutory purpose of preventing further descent or fractionation of escheatable interests. Such a tribal code might provide, for example, that an otherwise escheatable interest shall descend by intestacy to another owner of a fractional interest in the same tract.[11]

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[11] Other provisions of the Indian Land Consolidation Act address related land ownership problems on Indian reservations. For example, Section 203 of the Act, 25 U.S.C. 2202, extends Section 5 of the IRA, 25 U.S.C. 465, to non-IRA tribes, thereby empowering the Secretary to consolidate tribal or individual landholdings by means of the purchase, relinquishment, gift, exchange, or assignment of interests in land.

The Act also contains three sections that grant new powers to the tribes themselves, subject to Secretarial oversight. Under

**C. The Proceedings In this Case**

1. a. Appellees filed this suit on October 20, 1983, in the United States District Court for the District of South Dakota (J.A. 5). They challenged the constitutionality of Section 207 of the Indian Land Consolidation Act on the ground that it resulted in a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. The named plaintiffs, appellees herein, were Mary Irving, Patrick Pumpkin Seed, and Elaine Bissonette, as guardian for five minor children of Geraldine Poor Bear Cross. The named plaintiffs alleged that they are the potential heirs or devisees of parents (or, in one instance, an uncle) who died possessed of interests in tracts on the Pine Ridge Reservation or Rosebud Reservation that were subject to escheat under Section 207.[12] The four decedents collec-

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Section 204, 25 U.S.C. (Supp. II) 2203, a tribe is authorized to adopt a land consolidation program for the elimination of the checkerboard pattern of tribal lands and tribal ownership of fractional interests in reservation lands; the Secretary thereafter must approve any land transactions that are consistent with the tribe's plan. Section 205, 25 U.S.C. (Supp. II) 2204, authorizes a tribe to purchase (at fair market value and subject to certain exceptions) all of the interests in a tract of reservation land with the consent of the owners of more than 50% of the total interests in that tract. Finally, in order to stem the passage of previously allotted land into non-land ownership, Section 206 of the Act, 25 U.S.C. (Supp. II) 2205, permits a tribe, with the approval of the Secretary, to adopt an ordinance providing that non-members of the tribe or non-Indians shall not be permitted to receive an interest in trust or restricted lands by devise or descent, subject to special protections for non-member or non-Indian spouses or children. (The foregoing description of Sections 204, 205 and 206 reflects the 1984 amendments to those Sections made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*)

[12] The named plaintiffs sought to represent a class of all heirs and potential heirs of persons who died possessed of lands subject to escheat pursuant to Section 207 (J.A. 11-12). However, the district court entered judgment for the Secretary before it ruled on the named plaintiffs' motion for class certification, and the district

tively owned, at the time of their deaths, 65 interests in restricted or trust allotments (J.A. 18-39). According to the inventory of trust lands prepared by the Bureau of Indian Affairs for each decedent (J.A. 20, 22-28, 32-33, 37-39), 41 of those interests were so minimal as to be subject to Section 207.[13] One of the decedents, Geraldine Poor Bear Cross, owned 26 interests that were subject to escheat because they represented 2% or less of the total value of the tract in question and earned her less than $100 in the year prior to her death; thirteen of those 26 interests earned less than $1.00 and 19 earned less than $8.00 in the year prior to her death (J.A. 22-28). The smallest of the 26 was a 1/3645th undivided interest in 320.12 acres (.0002743484), which earned 35 cents in the previous year (J.A. 28). The escheated interests of the other decedents were comparably insubstantial (J.A. 20, 32-33, 37-39).

b. The district court held that Section 207 of the Act does not violate the Just Compensation Clause of the Fifth Amendment (J.S. App. 21a-26a). The district court reasoned that rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation; that nothing in the Constitution prohibits a legislature from limiting, conditioning, or even abolishing the power of testamentary disposition; and that an expectation of succession to the property of a living person, whether by intestacy or devise, does not vest until the death of that person (J.S. App. 22a-23a).

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court therefore denied the motion for class certification as moot (J.S. App. 26a).

[13] It appears from the record that, in the instance of the decedent Edgar Pumpkin Seed, the BIA erroneously subjected one allotment interest to escheat under Section 207 when in fact it constituted a 1/6 interest and therefore more than 2% of the total tract (J.A. 33). In the case of the decedent Charles Pumpkin Seed, it appears that the BIA erroneously excluded from escheat under Section 207 an interest that represented less than 2% of the total tract (.0104166) and that earned only $6.75 the previous year (J.A. 36).

Accordingly, the district court held that until the time of the death of their parents or uncle, appellees had only a mere expectancy of heirship that was subject to being altered by Congress at any time. For this reason, in the court's view, appellees had no vested property rights, and Section 207 did not result in a taking of their property for purposes of the Fifth Amendment. J.S. App. 23a-25a. The district court also held that under the applicable standard of review enunciated by this Court in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), Congress's treatment of the decedent Indian owners' undivided fractional interests was tied rationally to the fulfillment of Congress's unique obligation to the Indians. J.S. App. 24a-25a n.1.

2. The court of appeals reversed, holding that Section 207 is unconstitutional (J.S. App. 1a-17a).

a. The court of appeals first acknowledged that "Congress may alter and condition rights that have not yet vested in individual Indians" (J.S. App. 3a-4a, citing *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976), and *United States* v. *Jim*, 409 U.S. 80 (1972)) and that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause" (J.S. App. 4a (footnote omitted)). The court therefore held that the interference with any expectancy of heirship appellees might have had did not result in a taking of vested property rights (*ibid.*).

The court also rejected two theories by which appellees' contended that they had acquired such vested rights. First, the court found "disingenuous and excessively technical" (J.S. App. 5a) appellees' contention that Congress's use of the word "escheat" indicated an intent to affect only property of a decedent who died intestate without heirs, and therefore not to affect property rights that appellees asserted they inherited instantaneously upon the death of the respective decedents (*id.* at 5a-7a). In the court of appeals' view, the "sensible reading

of [Section 207] is that Congress, exercising its power as sovereign to control disposition of property at death, declared a limited class of property rights incapable of so passing" (*id.* at 5a (footnote omitted)). In these circumstances, the court reasoned, Congress's use of the term "escheat" is consistent with the established definition of that term to mean " '[a] reversion of property to the state in consequence of a want of any individual *competent to inherit*' " (*id.* at 6a, quoting *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis supplied by the court)).

The court of appeals likewise rejected the notion that appellees gained some sort of vested interest by virtue of the manner in which the United States originally allotted the lands in question to individual Indians (J.S. App. 7a-11a). Appellees relied on the language in the Sioux allotment statute that provided that the land would be held in trust for the allottee or, in the case of his decease, for "his heirs according to the law of the State or Territory where such land is located" (*id.* at 8a, quoting Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 891). However, in the court of appeals' view, this language was intended only to ensure that the trust status would continue beyond the death of the original allottee, not to grant a vested future interest in the immediate heirs of the original allottee and subsequent generations of his descendants (J.S. App. 8a-9a). The court observed that to find such a vested future interest in the heirs would be inconsistent with the provision in the Sioux statute itself for state law to govern the descent of an allotment by intestacy, since state law might be amended to alter the categories or order of succession of eligible heirs. The court also found appellees' assertion of a vested right of inheritance in descendants of the original allottee to be inconsistent with Congress's subsequent authorization for the owner of a trust or restricted allotment to devise the property to persons other than his heirs at law (*id.*

at 9a-10a, citing 25 U.S.C. 373, 464). Finally, the court reasoned that recognition of such a right under the Sioux allotment statute would be inconsistent with the purpose of the allotment acts to convert Indian lands to the American system of individualized rather than tribal ownership (J.S. App. 10a-11a).

b. Although the court of appeals held that Section 207 does not interfere with any vested rights of the *appellees*, the court nevertheless held that it does interfere with what the court of appeals found to be a vested right in the *original allottee and his successors* to pass the lands upon death (J.S. App. 15a-17a). The court so held even though it acknowledged that appellees had not directly rested their argument on any distinct right of their decedents (*id.* at 12a-13a n.11).

In the court of appeals' view, the Sioux allotment statute was in the nature of a bargain, under which the allottees received, inter alia, the right to control the disposition of their property at death in return for relinquishing their claims to tribal lands (J.S. App. 16a). On this premise, the court held that governmental interference with that right would result in a taking of property, just as this Court held in *Choate* v. *Trapp*, 224 U.S. 665 (1912), that Congress's repeal of the tax exemption for an allotment resulted in a taking (J.S. App. 15a-16a). Because Section 207 does not provide for the payment of compensation to the estate of the decedents whose lands are subject to escheat, the court of appeals held that Section 207 violates the Just Compensation Clause of the Fifth Amendment.

c. The property in question escheated prior to the October 1984 amendments to Section 207. As a result none of the named appellees was affected by the amended version of Section 207. Nevertheless, without further discussion or any analysis of the differences between the original and amended versions of Section 207, the court of appeals held that the amended version of Section 207 is unconstitutional as well (J.S. App. 17a).

## SUMMARY OF ARGUMENT

### I

Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe. This provision substantially furthers important governmental interests on behalf of Indians and is fully consistent with the Just Compensation Clause of the Fifth Amendment.

A. Although the plenary authority of Congress over the property of individual Indians is subject to constitutional limitations, Section 207 violates no such limitation. Section 207 is rationally tied to the fulfillment of Congress's unique obligation toward the Indians. Moreover, every sovereign possesses the power to regulate the manner and terms upon which property may be transmitted at death, as well as the authority to prescribe who shall and who shall not be capable of taking it. Congress possesses these sovereign powers with respect to property held by the United States in trust for Indians or held by Indians subject to federal restraints on alienation. In the exercise of this authority, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal law that is itself subject to change. Section 207 of the Indian Land Consolidation Act is consistent with these enactments.

B. There is no need in this case to consider the outer limits on Congress's authority with respect to the descent and distribution of Indian property, because Section 207 of the Indian Land Consolidation Act constitutes a carefully tailored measure that falls within whatever limits the Fifth Amendment might impose.

1. Congress has not imposed a blanket prohibition against the descent to private individuals of all Indian

property. Section 207 applies only to what Congress reasonably determined to be de minimis interests in trust or restricted allotments; it does not affect more substantial interests in allotments and has no effect whatever on other kinds of property held by Indians. By the same token, where Section 207 does apply, it addresses the problems associated with fractionated ownership where they are present in their most extreme form and brings about consolidation of that ownership either in individual Indians or in the tribe itself. Thus, the marginal limitation on the ability of Indians to dispose of or receive interests in allotments is a reasonable regulatory measure adopted in the interest of the Indians.

2. The conclusion that Section 207 does not violate the Fifth Amendment follows from a consideration of the three factors this Court has identified as particularly significant in determining whether governmental action constitutes a "taking" of property. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

a. First, with respect to the character of the governmental action, it is significant that Congress did not provide that the interests in allotments shall escheat to the United States; they pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. Because in most cases the tribe itself was the owner of the land prior to the allotment, the effect of Section 207 is to return the property to the original owner. This effect is consistent with the policies of the Indian Reorganization Act to end the allotment policy, consolidate reservations landholdings, and limit the loss of Indian lands to non-Indian ownership. The retention of the land in Indian ownership also serves to ensure that Section 207 is a reasonable regulatory measure designed to adjust benefits and burdens and promote the general welfare of the reservation. In addition, the devolution to the tribe of an interest in an allotment does not entirely sever the nexus of the tribal

member or his potential heirs to the property. The tribe has a special responsibility for its members, who in turn collectively own a beneficial interest in all tribal property, including property that escheats pursuant to Section 207. Thus, there is a "reciprocity of advantage" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)) among individual tribal members by virtue of the operation of the escheat provision on the reservation.

b. The economic impact of Section 207 is limited because it affects only those interests in allotments that Congress reasonably found to be of a minimal value and to represent an insignificant stake in the allotment. Nor does Section 207 significantly interfere with the decedent's incidents of ownership. The owner of an escheatable interest in an allotment retains his full right to receive income from it or to sell or donate it during his lifetime, and is deprived only of the ability to dispose of the interest in kind upon his death. He may, for example sell his interest and provide for the payment of the proceeds to his heirs or devisees upon his death. Moreover, under the amended version of Section 207, the owner may dispose of the interest even at death, provided that it is devised to another owner of an interest in the same property. In these circumstances, the limitation Section 207 imposes on only one of the incidents of ownership—the ability to have the property descend in kind to a particular heir—does not impermissibly interfere with the owner's property rights viewed in the aggregate. *Andrus* v. *Allard*, 444 U.S. 51 65-66 (1979).

c. Finally, Section 207 does not undermine distinct investment-backed expectations. A potential heir or devisee of property has no legally vested right in that property, and his bare expectancy of receiving it is not protected by the Fifth Amendment. By the same token, the incidents of ownership preserved by Section 207 in the owner of the fractional interest fully satisfy any reasonable investment-backed expectations that he may

have had. Indeed, the interest almost invariably passed to the owner by inheritance or devise, and it is unlikely that he would have made any investment in the property in anticipation of passing that interest upon his death. Moreover, the interests affected are held subject to restrictions on alienation, and Congress retains the right to alter those restrictions and the rules governing the distribution of the property at death. These circumstances further undermine any expectation of an unqualified right to dispose of de minimis interests at death.

C. The court of appeals did not disagree with the foregoing principles as a general matter. However, it held that although appellees had no vested rights that were affected by Section 207, the decedent owners of the interests in the allotments had a vested right to control the disposition of those interests at death. The court of appeals erred in construing the Sioux allotment statute as a form of contract in which Congress conferred such a right on the original allottees and each generation of their heirs to be exempt from whatever amendments Congress might adopt to govern the descent and distribution of Indian property.

Section 11 of the Sioux allotment statute provides that an allotment will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located" (25 Stat. 891). Thus, Section 11 provides for the disposition of allotments to be governed not by the allottee's own preferences, but by state law that was itself subject to change. It was not until the Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373 *et seq.*, that the Sioux Indians and other allottees were granted the right to devise restricted property by will, and thereby to control its disposition.

Moreover, this Court has repeatedly held that absent some clear indication that the legislature intends to bind

itself contractually, a law is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the legislature shall ordain otherwise. The Court applied this principle in the very context of Indian allotments in *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918). There, the Court held that Congress, by specifying that the descent of allotments would be governed by a particular law, did not create a contractual right to have that law applied, and that Congress therefore remained free to amend the allotment statute to provide for another disposition of the property. There is no reason to believe that Congress intended a different result under Section 11 of the Sioux allotment statute.

Nor does the explanation of the Sioux allotment statute to the Indians support the view that the Sioux, unlike all other Indians affected by the allotment policy, bargained for and obtained a vested right on behalf of the original allottees and their descendants to control the disposition of their allotments at death. The report of the Commission that met with the Sioux reflects an understanding on the part of the Indians that, if they elected to take land by allotment, the land would be held in trust for 25 years and that thereafter they would have absolute fee title in the same manner as the white man. However, neither Section 11 of the Act nor the report of the Commission reflects an understanding that the Indians would be exempt from the power of the sovereign to revise the rules of descent of Indian property, particularly while it remained in trust status. But even if some right to control the disposition of property at death were originally within the contemplation of Congress and the Indians, that right could not have been intended to be both permanent and absolute, even in the face of the drastically changed circumstances that confronted Congress when it enacted Section 207 almost 100 years later.

II

Although all of the interests of the decedents in this case escheated pursuant to the original version of Section 207, the court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. Because there was no case or controversy regarding the application of the amended Section 207 to the parties in this case, the court of appeals had no authority to invalidate that provision. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980).

## ARGUMENT

### I. SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT OF 1983 DOES NOT RESULT IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT

Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 in order to stem the ever-increasing fractionation of ownership that has inhibited the use and development of allotted lands on Indian reservations and has rendered the administration of Indian lands and estates both complex and unduly expensive. The provision in Section 207 for the "escheat" to the tribe of certain de minimis interests in Indian allotments upon the death of the owner constitutes a reasonable exercise by Congress of the inherent sovereign power, recognized by this Court on numerous occasions, to regulate the descent and distribution of property and to provide for the disposition of property for which there are no heirs who qualify by statute to receive it. This regulatory measure furthers the United States' obligation to the Indians by providing for the gradual elimination of the most extreme aspects of the fractionated ownership problem that has plagued Indian reservations for generations, while at the same time retaining the interests

affected in Indian ownership under the auspices of the tribe concerned.

By the same token, Section 207 has only a minimal impact on private property rights. First, as the court of appeals recognized (J.S. App. 4a, 11a), potential heirs or devisees such as appellees have no vested rights in the receipt of the property of a living person, and appellees acquired no such vested rights under the Sioux allotment act. Second, Section 207 does not substantially interfere with the rights of persons, such as appellees' decedents, who are the owners of de minimis fractional interests in allotments. The owner of such an interest may retain and benefit from it during his lifetime or make an inter vivos transfer of the interest to a relative or to another owner of an interest in the same tract. Moreover, under the amended version of Section 207, the owner likewise may avoid escheat of the interest upon his death by devising it to another owner of an interest in the same allotment.

The court of appeals held, however, that the decedents in this case had vested rights in being able to control the disposition of their interests in allotments at death and that the effect of Section 207 on that right violated the Fifth Amendment (J.S. App. 15a-17a). The court erred. When the Sioux allotment statute was enacted in 1889, an Indian had no right to control the disposition of such property at death; the right to devise a restricted allotment by will was not conferred on Indians until 1910. Nor did the Sioux allotment statute grant the original allottees and their heirs and descendants a contractual or vested right to have their interests in allotments descend in the manner provided under state law as it happened to exist in 1889—a right that would amount to a perpetual exemption from the otherwise recognized power of the sovereign to modify the laws of descent and distribution. What the original allottees received was the right, shared by all property owners, to have their prop-

erty descend in accordance with the laws governing such matters that are in effect at the time of their death. Section 207 was one such law at the time of the death of appellees' decedents.

### A. Section 207 Is A Valid Exercise Of Congress's Plenary Power To Regulate The Descent And Distribution Of Interests In Indian Property

This Court repeatedly has recognized that Congress has plenary authority over Indian affairs and property, particularly property held in trust by the United States or subject to the restraints against alienation that long have characterized Indian tenure. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, No. 83-2161 (June 3, 1985), slip op. 4-5; *National Farmers Union Insurance Co.* v. *Crow Tribe*, No. 84-320 (June 3, 1985), slip op. 5; *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 7, 21; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310-317 (1911); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903); *United States* v. *Kagama*, 118 U.S. 375, 379-385 (1886). See also *United States* v. *Sioux Nation*, 448 U.S. 371, 408, 414-415 (1980). It necessarily follows that Congress's authority to regulate the disposition of interests in trust or restricted property upon the death of the Indian owner encompasses whatever sovereign powers a State would have over such matters,[14] plus the unique powers of Congress attributable to the special relationship of the United States to the Indians.

Although the plenary power of Congress over the property of Indians is subject to constitutional limita-

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[14] The court of appeals recognized that the powers of Congress over Indians are "similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves" (J.S. App. 5a n.4, citing F. Cohen, *Handbook of Federal Indian Law* 219-220 (1982)), and "thus are comparable to those of state governments in their respective realms" (J.S. App. 5a n.4). Compare *Mormon Church* v. *United States*, 136 U.S. 1 (1890).

tions (see, *e.g.*, *United States* v. *Sioux Nation*, 448 U.S. at 415), Section 207 of the Indian Land Consolidation Act of 1983 violates no such limitation. That Section is, beyond question, rationally related to the fulfillment of Congress's unique obligation to the Indians, and it therefore comports with the Due Process Clause of the Fifth Amendment. *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).[15] Nor does Section 207 result in a taking of private property for public use within the meaning of the Fifth Amendment.[16] Rather, Section 207

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[15] The escheat provision is consistent with current federal policies, which began with the IRA and were continued by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*, of strengthening tribal governments, assisting tribes in becoming self-sufficient, and promoting the development of reservation land and resources. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, slip op. 7 n.5; *National Farmers Union Insurance Co.* v. *Crow Tribe*, slip op. 10; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 & n.17 (1983); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973). The Indian Land Consolidation Act promotes these policies by assisting tribes in establishing an economically viable land base for the tribes and their members. In particular, Section 207 aggregates what would otherwise be de minimis interests from which little or no benefit would accrue if they were retained in separate ownership, and thereby renders such interests capable of generating meaningful revenue or being used for some other purpose that will benefit the tribe and its members.

[16] The legislative history of Section 207 strongly reflects Congress's intention that the Act not result in any cost to the United States. H.R. Rep. 97-908, *supra*, at 11; S. Rep. 98-632, *supra*, at 8; *1984 Hearing* 19, 20, 23, 30-31, 33, 34, 35, 37, 38, 39, 40, 42, 46, 57, 76; *1983 Hearing* 21, 38. Compare 25 U.S.C. (Supp. II) 2205(3). Moreover, the legislative history of the 1984 amendments reflects an awareness of the district court's holding in this case that Section 207 does not result in a taking of vested property rights. S. Rep. 98-632, *supra*, at 5; *1984 Hearing* 26, 76. Against this background, Congress cannot be understood to have intended to make a Tucker Act remedy available against the United States. Compare *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28-30.

represents "nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal[,] within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 492-493 (1850). The Court long has recognized this sovereign power. See, *e.g.*, *Tooahnippah* v. *Hickel*, 397 U.S. at 609; *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288-291 (1898); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896); *United States* v. *Fox*, 94 U.S. 315, 320-321 (1876); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 202 (1825).

This Court's decisions have described the legislature's power with respect to the descent of property in broad language that goes well beyond what is necessary to sustain the Act of Congress at issue here. For example, the Court has stated that statutes permitting the disposition of property by will are enabling acts, and that a person may not devise his property in the absence of such authorization. See, *e.g.*, *Tooahnippah* v. *Hickel*, 397 U.S. at 609; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 289; *United States* v. *Perkins*, 163 U.S. at 627-628; *United States* v. *Fox*, 94 U.S. at 320. Similarly, the Court has stated that where the sovereign has provided for the descent of property to heirs designated by law, the potential heirs do not actually have vested rights, prior to the death of the owner, to receive the property [17];

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[17] Since the decision in *D'Arundel's Case* in 1225 and "throughout the later history of English law, including the times of Coke and of Blackstone, a bare expectancy was regarded as nothing whatever." L. Simes & A. Smith, *The Law of Future Interests* 412 (2d ed. 1956). The basis for the rule that a prospective heir has no interest or vested right in his ancestor's estate is reflected in the Latin maxim " 'Nemo est haeres viventis,' " *i.e.*, no one can be the

accordingly, the laws governing intestate succession may be revised by the legislature, and the revised laws may be applied to particular property without contravening the Fifth Amendment, so long as ownership of the property had not become vested in the heirs under prior law by virtue of the death of the owner. *Irving Trust Co.* v. *Day*, 314 U.S. at 562; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288; *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) at 148. See generally 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199, 201 (1979); *id.* § 2406, at 208-209, 211-212. These views were summarized by the Court in *Irving Trust Co.* v. *Day*, 314 U.S. at 562 (citations omitted):

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufference. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. * * * Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.

The Court has enunciated these same principles in the context of the descent and distribution of Indian property. Thus, the Court has stated that the right of an Indian to devise property by a will is of statutory creation (*Tooahnippah* v. *Hickel*, 397 U.S. at 609), and that Congress retains the power to amend the statutes governing intestate succession and to apply those amendments to an interest in an allotment that has not already passed to the heirs of the owner (*Jefferson* v. *Fink*, 247 U.S. at 294). See also *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), aff'd, 384 U.S.

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"heir of a living person." 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2410, at 234 (1979).

209 (1966). In fact, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal laws or federal regulations, all of which are themselves subject to change. See, *e.g.*, 25 U.S.C. 372, 373, 464, 2205; *Jefferson* v. *Fink*, *supra*; *Simmons* v. *Eagle Seelatsee*, *supra*.[18] Congress also has provided for the escheat to the tribe concerned of interests in allotments held by an Indian who dies intestate without an heir qualified to receive the property. 25 U.S.C. 373a; page 6, *supra*. Section 207 of the Indian Land Consolidation Act of 1983 is but another example of Congress's exercise of this authority.

### B. Section 207 Is A Carefully Tailored Regulatory Measure That Does Not Result In A "Taking" Of Private Property Within The Meaning Of The Fifth Amendment

There is no need here to consider the limits of the principles discussed in point A regarding the authority of the legislature over the descent of property, or to consider the application of those principles to a state or federal statute that absolutely barred an individual from devising any of his property by will or that designated

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[18] For example, the decedents in this case were members of the Oglala Sioux Tribe, which is organized pursuant to the IRA. Property subject to Section 4 of the IRA, 25 U.S.C. 464, may only be devised to or inherited by members of the tribe, lineal descendants of the decedent, or other Indians for whom the United States may hold land in trust. See *Cultee* v. *United States*, 713 F.2d 1455, 1457-1460 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). As a result, at least since 1934, there have been restrictions placed on the devise and descent of property on IRA reservations, and certain classes of persons have been barred from inheriting restricted property. Section 4 of the IRA and Section 207 of the Indian Land Consolidation Act thus share a common purpose: to preserve and consolidate reservation lands in Indian ownership. See 54 Interior Dec. 584, 585-586 (1934).

the government as the heir to all private property. Cf. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288-289. In enacting Section 207 of the Indian Land Consolidation Act, Congress invoked the doctrine of escheat and declared the tribe to be the ultimate heir with respect to only a narrow category of de minimis interests in property in order to further substantial public purposes on behalf of Indians. As we explain below, this carefully tailored and flexible measure falls well within whatever limits the Fifth Amendment might place on Congress's plenary power over Indian property in this setting.

1. Congress has not imposed a blanket prohibition against the passing of all interests in trust or restricted allotments to private individuals by intestacy or devise. Section 207 applies only to what Congress reasonably determined to be de minimis undivided fractional interests in such allotments: those that represent less than 2% of the tract and that earned the owner less than $100 in the preceding year (or, under the amended version, are incapable of earning $100 annually). More substantial interests may continue to pass to heirs in accordance with state law, as provided by the Sioux allotment statute, or to devisees by will, as provided by 25 U.S.C. 373. And, of course, interests owned by individual Indians in property other than restricted allotted lands are entirely unaffected by Section 207. Thus, as a general matter, Section 207 imposes only a marginal limitation on the ability of Indians to dispose of or receive interests in property.

Moreover, where it does operate, Section 207 serves significant public purposes. As we have explained (see pages 6-9, *supra*), the increasingly fractionated ownership of Indian allotments has greatly complicated the leasing or other use of allotments, often preventing their most economic development; devalued the undivided interests because of the practical difficulties associated with use or sale of the land; greatly attenuated the relationship of the numerous individual owners to the land

itself; and created substantial and costly administrative difficulties for the BIA in administering the land and the estates of deceased Indians. Section 207 is narrowly tailored to address the category of cases in which Congress rationally could determine that these problems are present in their most extreme form because the ownership is the most fractionated. These considerations demonstrate that Section 207 is a reasonable regulatory measure that substantially furthers Congress's responsibilities to the Indians by providing for devolution of fractionated interests to the tribe itself in narrowly limited circumstances. It does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), and therefore does not transgress whatever limitations the Just Compensation Clause of the Fifth Amendment might be thought to place on the power of Congress to specify the distribution of trust or restricted property upon the death of the Indian who is the beneficial owner.

2. The conclusion that Section 207 is not inconsistent with the Just Compensation Clause properly reflects this Court's decision under that Clause. As the Court recently reiterated, its decisions "have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13. However, to aid in this determination, the Court has identified three factors that have " 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Id.* at 13, quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Each of these factors weighs against finding that Section 207

results in a taking of property within the meaning of the Fifth Amendment.

a. With respect to the nature of the governmental action, it is significant that Congress did not provide that the de minimis interests involved shall escheat to the United States; they instead pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. This factor is important for several reasons. In most cases, the tribe itself was the owner of the land prior to the allotment,[19] and Section 207 has the effect in those circumstances of returning property to the original owner. When Congress formally abandoned the allotment policy in 1934, it sought to return the tribes and their reservations to their prior status to the degree possible by restoring surplus land to tribal ownership, providing for the consolidation of tribal lands, barring further allotments, retaining existing allotments in trust or restricted status, and circumscribing the category of persons to whom restricted lands may descend. See pages 3, 6, *supra*. Section 207 is consistent with and furthers these policies of the IRA that have governed Indian land ownership on reservations for more than 50 years.

The fact that the de minimis interests involved do not pass to the United States also serves to distinguish Section 207 from statutes that constitute a direct interference with the property by the enacting government. Its role instead is to adjust benefits and burdens in order to promote the common good of individual property owners and other persons in the reservation community generally. See *Connolly*, slip op. 13; *Penn Central*, 438 U.S. at 124. The retention of the land in Indian ownership likewise serves to ensure that the regulatory measure is in fur-

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[19] In the present case, the Sioux Nation owned the land prior to enactment of the 1889 Sioux allotment statute, which established separate reservations for the various Sioux tribes and provided for allotment of lands in severalty within each reservation.

therance of the United States' special relationship to the Indians, and not an act of expropriation by the government directed to other ends. Compare *United States* v. *Sioux Nation*, 448 U.S. at 414-417. Thus, although Congress used the word "escheat" in Section 207, that section simply has the effect of designating the tribe concerned as the statutory heir of de minimis interests of which the owner has made no other permissible disposition at the time of his death. And, because the owner of an undivided interest in an allotted parcel almost invariably does not occupy or use the land, but merely receives a share of whatever income it generates as a result of its lease to others, Section 207 does not interfere with such fundamental rights of ownership as the right to exclude others from the premises. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979).

Further, the Indian tribe to which the property passes has a special responsibility for its members and their family and for the land within its jurisdiction. The members in turn have a special bond among themselves through the tribe and collectively own a beneficial interest in tribal property, including property that escheats pursuant to 25 U.S.C. 2206. The escheat to the tribe of a member's de minimis interest in an allotment therefore does not entirely sever the nexus of that member or his heirs to the property. It also is significant that Section 207 applies uniformly to all undivided interests that represent 2% or less of an allotment and do not satisfy the $100 income test. Although the escheat of any particular parcel might adversely affect the deceased owner of that parcel or his potential heirs or devisees, those heirs and devisees, if they retain a nexus to the tribe or the reservation, presumably stand to benefit by the escheat of other interests to the tribe. As a result there is a "reciprocity of advantage" that substantially undermines any taking argument in this setting. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415; *Penn Central*, 438 U.S. at 139-140 (Rehnquist, J., dissenting).

Finally, and in a related vein, the impact of the ability of the owner of a fractional interest in the allotment to pass that interest by intestacy or devise is not the consequence of a regulatory measure undertaken for an unrelated public purpose, such that fairness and justice might suggest that compensation be paid by the public as a whole. The fractionated ownership exemplified by the de minimis interest is itself the cause of the problem that Congress sought to remedy, because such an interest has adverse effects on other owners of the property and on the reservation community as a whole. A legislature has particular authority to address and eliminate such adverse consequences to others in the community. *Penn Central*, 438 U.S. at 125-127. See, *e.g.*, *Connolly*, slip op. 15-16; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). By contrast, consolidation of these interests in the tribe serves to enhance their aggregate value, to the common benefit of all members of the tribe.

b. With regard to the second factor, the economic impast of Section 207 is limited because it applies to an interest that repreensts 2% or less of the value of the allotment and has not earned or is incapable of earning more than $100 annually. Congress reasonably could determine that such an interest is sufficiently de minimis in its relative economic value and reflects a sufficiently insubstantial stake in the allotted parcel as a whole to warrant its devolution to the tribe in lieu of still further fractionation. The circumstances of this case are consistent with this considered judgment by Congress. Of the 41 interests in allotments in this case that escheated to the tribe pursuant to Section 207, 17 earned less than $1.00 in the preceding year, 29 earned less than $5.00, and all but two earned less than $10.00. See page 13 & note 13, *supra*; J.A. 20, 22-28, 32-33, 37-39.

In addition, even as regards such de minimis interests, Section 207 affects only one of the incidents of owner-

ship: the ability to dispose of the property at death. The court of appeals' holding that Section 207 is unconstitutional is based on the erroneous premise that any restriction on that ability necessarily constitutes a taking. This Court, however, has held that

> the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

*Andrus* v. *Allard*, 444 U.S. at 65-66.

In *Allard*, the owner was barred from selling the particular property but could retain, donate, or devise it. The Court held that the restriction on one means of disposing of the property did not constitute a taking. *Id.* at 66-68. Similarly, here, the owner of a de minimis fractional interest in an allotment retains his full enjoyment of all the incidents of ownership but one: the ability to have his interest in the allotment descend by intestacy or devise in the same form in which he held it during his lifetime. Thus, the owner of an interest that is subject to escheat under Section 207 may dispose of that interest during his lifetime by selling it to another owner of an interest in the same parcel, by exchanging it for another interest of equal value, or by donating it to a relative—perhaps retaining a life estate in order to ensure that he will continue to realize whatever benefits accrue from ownership. 25 C.F.R. 152.25.[20] Similarly, the owner may acquire an additional interest in the tract in order to

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[20] One of the decedents, Geraldine Poor Bear Cross, executed a will on March 16, 1983—after Section 207 was enacted—in which she left all her worldly goods to her five minor children. Complaint, Exh. D. That bequest presumably included her interests in allotments, although those interests were not mentioned. Escheat pursuant to Section 207 could have been avoided if Geraldine Poor Bear Cross had made an inter vivos transfer of those interests at the time she executed her will.

bring his total share above the 2% level necessary to avoid escheat. 25 C.F.R. 151.7. And, in appropriate circumstances, he could apply for partition of the parcel in kind. 25 C.F.R. 152.33. Furthermore, under the amended version of Section 207, an owner may dispose of an otherwise escheatable interest by will, provided it is devised to another owner of an interest in the same property. And even under the original version of Section 207, the owner retained the ability to pass the *value* of his interest in the allotment by making an inter vivos sale of his interest and providing for the proceeds of that sale to be paid to his heirs or devisees upon his death. Thus, Section 207 affects only the descent of fractional interests in kind. Accordingly here, as in *Andrus* v. *Allard*, *supra*, the statute does not impermissibly interfere with the incidents of ownership viewed in the aggregate.

c. Finally, Section 207 does not have a significant impact on any distinct investment-backed expectations. As the court of appeals recognized (J.S. App. 3a-5a), a potential heir or devisee of property has no vested right to receive that property. See pages 13-14, 26-27, *supra*. His bare expectancy of doing so is not entitled to Fifth Amendment protection, irrespective of an anticipatory investment he might have made. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980).

Nor does Section 207 undermine any distinct investment-backed expectation of the deceased owner of the affected fractional interest in an allotment. The incidents of ownership that are preserved, which we have just discussed, are themselves adequate to allow a reasonable return on investment in the property (cf. *Penn Central*), if any investment is involved. In most cases, however, the fractional interest was acquired by the owner by intestacy or devise and then was held in trust for him until the time of his death without any commitment whatsoever of his own resources. In light of the insubstantial nature of the interest, the owner's only association with the allotted

parcel during his lifetime would ordinarily have been the receipt of a share of the income it generated. Moreover, even during the decedent's lifetime, the allotment was held subject to restrictions that would have required the consent of the federal government for any alienation. Congress retained the right to alter those restrictions at any time (see *e.g.*, *Tiger* v. *Western Investment Co.*, 221 U.S. at 316) or to alter the rules governing the distribution of the property at death (*Jefferson* v. *Fink*, 247 U.S. at 294). This pervasive regulation further undermined the reasonableness of any expectation appellees' decedents might have harbored that they would have an unqualified right to provide for the disposition of their fractional interests at death in whatever manner they chose. Cf. *Connolly*, slip op. 14-15; *Tooahnippah* v. *Hickel*, 397 U.S. at 612-613 (Harlan, J., concurring).

d. The foregoing factors demonstrate that Section 207 constitutes a reasonable exercise by Congress of the established sovereign power to prescribe reasonable rules for the distribution of property upon the death of the owner and does not, in its general operation, result in a taking of property that would require the payment of just compensation.

### C. The Original Sioux Allottees And Their Descendants Did Not Obtain A Unique Vested Right To Control The Distribution Of Their Interests In Allotments At Death, Irrespective Of Any Intervening Amendments By Congress

The court of appeals did not dispute the general principles that control this case, discussed in points A and B, *supra*. In fact, it expressly concurred in the view that potential heirs or devisees ordinarily have no vested interest in the receipt of property of a living person that is protected by the Fifth Amendment against intervening changes in the law of descent and distribution (J.S. App. 4a). The court of appeals also correctly held that the Sioux allotment statute did not confer any such vested

rights on appellees in the circumstances of this case (*id.* at 11a). But although the court appeared to recognize that appellees did not so argue (see *id.* at 12a-13a n. 11), it held that "the *decedents* in this case had vested rights in being able to control the disposition of their property at death" (*id.* at 15a (emphasis added)), and that the effect of Section 207 on that supposed right violated the Fifth Amendment (J.S. App. 16a-17a).

In the court of appeals' view, the provision in the Sioux allotment statute that state law was to govern inheritance reflected a "bargain," under which the individual Sioux allottee (and each of his descendants) obtained a right to dispose of the property at death in return for the allottee's relinquishment of his interest in tribal lands. The court believed that recognition of such a right was supported by the references in the explanation to the Indians of the importance of trust patents under the Sioux allotment statute for purposes of protecting the Indians and their children. Finally, the court of appeals expressed the view that "the power to control such disposition predominantly characterizes the 'white man's ways' which the Indians were to assimilate" (*id.* at 16a). This analysis is seriously flawed.

1. As an initial matter, the court of appeals' notion that the original allottee and his descendants obtained a vested right to control the distribution of the allottee's interest in the allotment at death is refuted by the text of the Sioux statute. Section 11 of that Act provides that the land will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located" (25 Stat. 891). The term "heirs" as used in this Section plainly refers to the allottee's heirs under the state law of intestate succession. See F. Cohen, *supra*, at 230-231 (1942). An allottee would have had no power to control the designation of his heirs under state law.

The court of appeals erred in another critical respect in inferring that the power to control the disposition of property at death was a bargained-for right analogous to the right to exemption from state taxation that was at issue in *Choate* v. *Trapp*, 224 U.S. 665 (1912). See J.S. App. 15a-16a.[21] Prior to the Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373, *et seq.*, the Sioux Indians unquestionably did *not* have the power to dispose of a trust or restricted allotment by will. See *Tooahnippah* v. *Hickel*, 397 U.S. at 613 (Harlan, J., concurring); *Blanset* v. *Cardin*, 256 U.S. at 323-327. When the Sioux allotment statute was passed, the General Allotment Act, after which the Sioux statute was patterned, already prohibited the descent of interests in allotments except in accordance with the state or territorial law of intestate succession. By agreeing to a comparable provision in Section 11 of the 1889 Act, the Sioux actually relinquished the control the tribe otherwise possessed over the disposition of its members' property. See *Jones* v. *Meehan*, 175 U.S. at 29, 32. Thus, by consenting to a statute that preempted the tribe's authority, the Sioux accepted the consequence that the descent and distribution of allotted lands on their reservations thereafter would be controlled by laws that were subject to modification either by the legislature of the State or by Congress in the exercise of its superseding prerogatives.

2. In any event, the court of appeals clearly erred in construing the Sioux allotment statute as a form of con-

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[21] The statute at issue in *Choate* incorporated an agreement with the Choctaw and Chickasaw Tribes, which stated that "[a]ll the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent * * *." Act of June 28, 1898, ch. 517, § 29, 30 Stat. 507. The right of the Choctaw and Chickasaw allottees to be exempt from taxation for a specified period thus was expressly conferred by Congress. By contrast, the relevant language in Section 11 of the Sioux allotment statute was not part of a separate agreement with the Sioux, and Section 11 does not expressly confer an exemption from changes in the law of intestate succession.

tract, under which Congress conferred on individual allottees and every succeeding generation of their descendants a permanent and vested right to be exempt from whatever amendments the legislature might adopt to govern the distribution of a decedent's property. This Court has recently reaffirmed that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declare a policy to be pursued until the legislation shall ordain otherwise.'" *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14, quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). There is no suggestion whatever—much less a "clear indication"—in Section 11 of the Sioux allotment statute that Congress intended to confer on Indian allottees and their descendants a contractual exemption from the operation of amendments to laws governing Indian property.[22]

Moreover, in *Jefferson* v. *Fink*, *supra*, the Court rejected such an argument in the very context of the inheritance of Indian allotments. In that case, an allotment had been issued pursuant to an agreement with the Creek Tribe that was embodied in the Act of June 30, 1902, ch. 1323, 32 Stat. 500 *et seq.* Section 6 of the Act, 32 Stat. 501, provided that the descent of Creek allotments would be governed by the laws of Arkansas. However, by the Act of May 27, 1908, ch. 199, § 9, 35 Stat. 315, Congress provided that the laws of descent and distribution of the newly admitted State of Oklahoma thereafter would apply to the lands allotted to members of the Five Civilized Tribes. The argument was raised in *Jeffer-*

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[22] The State of South Dakota has altered its applicable laws on several occasions subsequent to the enactment of the Sioux Allotment Act in 1889. For example, dower and curtesy were abolished in South Dakota four years after the passage of the 1889 Act. 1893 S.D. Sess. Laws ch. 76, § 1. See also 77 Interior Dec. 268 (1970); 61 Interior Dec. 307 (1954).

*son* v. *Fink*, *supra*, that Congress, by specifying in the 1902 allotment statute that the descent of allotments would be governed by Arkansas law, had created a vested or contractual right to have that law applied, and that Congress could not later provide for another disposition of the property of a deceased allottee. 247 U.S. at 293-294. The Court, however, rejected this view of the 1902 Act (*id.* at 294):

> What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir. Cooley's Constitutional Limitations, 7th ed. 512.

In support of this holding, the Court relied in part on the language in Section 5 of the General Allotment Act that provides for an allotment to continue to be held in trust for the original allottee's heirs as defined by state law (247 U.S. at 290). Because the relevant language in Section 11 of the Sioux allotment statute is identical to that in Section 5 of the General Allotment Act, there likewise is no reason to believe that Congress intended when it passed the latter Act to confer on the Sioux allottees a contractual right to be exempt from future statutory changes affecting the distribution of property.[23]

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[23] The Department of the Interior, which is responsible for administering Indian allotment and probate laws, also has rejected the contention that an original allotment secures in the allottee's heirs vested rights that are protected by the Fifth Amendment as against subsequent legislation that alters the rules of descent and distribution. 66 Interior Dec. 361 (1959). The Interior Department's interpretation of the allotment statute is entitled to "great respect." *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976).

3. Nor does the explanation of the Sioux allotment statute to the Indians support the view that the Sioux, unlike other Indians affected by the allotment policy, actually bargained for and obtained from the United States such a vested right. As an initial matter, the relevant language in Section 11 did not originate in the Sioux allotment statute; it was drawn verbatim from Section 5 of the General Allotment Act. Because the latter Act was not the product of negotiations with Indian tribes, and because the application of its allotment provisions was not made contingent upon the agreement of the Indians concerned, there is no basis for construing the pertinent language in Section 11 to contract away Congress's sovereign power to revise the laws governing the descent of Indian property.

The court of appeals relied on selected passages from the report of the Commission sent to the Sioux territory in 1889 to obtain the approval of the Indians to the allotment statute (J.S. App. 11a n.10, 12a, 15a-16a). However, as the court of appeals acknowledged, the references to children and heirs are "relatively sparse" in the nearly 200-page report (*id.* at 12a n.10). In any event, the selected passages upon which the court of appeals relied provide no basis for the notion that the Indians bargained for and obtained a right, not expressed in the Sioux allotment statute itself, to pass property at death free from the effect of reasonable governmental regulation. Cf. *Oregon Fish & Wildlife Dep't* v. *Klamath Tribe*, No. 83-2148 (July 2, 1985), slip op. 19.

The 1889 Allotment Act was the second statute enacted by Congress to provide for the division and opening up of the Great Sioux Reservation. In 1888, another Commission had unsuccessfully attempted to secure the consent of the Sioux to the Act of Apr. 30, 188, ch. 206, 25 Stat. 94 *et seq.* The Indians' rejection of the provisions of the prior Act caused Congress to make several changes in the 1889 Act. The most significant were the

doubling (from 160 to 320 acres) of the amount of land to be allotted to heads of families (§ 8, 25 Stat. 890) and the increase in the price per acre to be charged for lands that were to be made available for settlement by non-Indians.[24] However, the proviso in the 1888 Act regulating the descent and distribution of allotments was not altered, and it reappears in identical form in the 1889 statute. Compare § 11, 25 Stat. 98, with § 11, 25 Stat. 891. This background, together with the absence of any debate over Section 11 in Congress[25] and the lack of any mention of the descent and distribution proviso to Section 11 in the report of the Commission, makes clear that Congress did not intend to confer an unprecedented right to be exempt from the sovereign power to alter the rules of descent and distribution.

Moreover, the Commission repeatedly informed the Indians that it had no power to bargain with them,[26]

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[24] Under the 1888 Act, all land outside the separate diminished reservations was to be made available for sale to settlers at the price of 50 cents per acre. § 21, 25 Stat. 102. The 1888 Act was rejected chiefly because of the objection of the Sioux to that price. S. Exec. Doc. 51, 51st Cong., 1st Sess. 36 (1890). Under the 1889 Act, the land opened for settlement was to be sold at $1.25 per acre for the first three years, 75 cents per acre for the next two years, and 50 cents per acre thereafter. §21, 25 Stat. 896. The points of difference between the two Acts are summarized in the Department of the Interior's Letter of Instructions to the Commission. S. Exec. Doc. 51, *supra*, at 37-39.

[25] See H.R. Rep. 3645, 50th Cong., 2d Sess. (1889); 20 Cong. Rec. 1492-1496, 1578-1586, 1903-1904, 2283-2284, 2476, 2498 (1889).

[26] See S. Exec. Doc. 51, *supra*, at 45. ("This act you must accept as a whole. We have no power to treat with you."); *id.* at 60 ("We have no authority to change it."); *id.* at 141 ("We have no power to add one word or take one thing from what the Great Father offers you in this bill."); *id.* at 153 ("We have no power to change the law. It will be your duty to accept it or reject it as it is."); *id.* at 190 ("We have no power to change this law.").

thereby underscoring that they could not confer any such special exemption that was not embodied in the Act itself. During the Commission's travels, the Indians were informed that if they elected under Section 11 to take lands by allotment, the lands would be held in trust for twenty-five years so "you cannot be traded or cheated out of it, so that it will remain for you and your children and your children's children" (S. Exec. Doc. 51, 51st Cong., 2d Sess. 73 (1890)). However, this and similar statements (see J.S. App. 11a-12a n.10) simply reflected the overriding purpose of the Act, as explained to the Sioux, of advancing the Indians "as rapidly as possible in the ways of the white man" (S. Exec. Doc. 51, *supra*, at 157). Thus, at the expiration of the trust period, the Indians who took land by allotment were to receive the absolute fee title to the land, "the same as the white man has for his lands" (*id.* at 190). Thereafter, the property was to be treated the same as property owned by non-Indians (*id.* at 46, 157, 159-160). See § 11, 25 Stat. 891. In fact, the court of appeals acknowledged that "[t]he general emphasis [of the Commission's meetings] was that conversion to 'white man's ways' and system of individual ownership * * * would promote the best life and the best future for the Indians' children, not that the treaty [*sic*] would vest specific rights to Indian lands in heirs in perpetuity" (J.S. App. 12a n.10). Yet the effect of the decision below is to *exempt* Indians possessing fractional interests from the otherwise unquestioned power of the sovereign to enact laws modifying the right to transmit property—a power to which the "white man" concededly was subject.

4. Finally, even if some right to pass an interest in an allotment at death was originally contemplated when the Sioux allotment statute was enacted almost 100 years ago, that right cannot be thought to have been of permanent effect (compare *Choate* v. *Trapp*, 224 U.S. 665, 677 (1912)) and to vest absolutely in each succeeding gen-

eration of the allottee's descendants. The Sioux allotment statute was passed against the background of an expectation that allotments would be free of all federal restrictions on alienation within a generation or two. For this reason, the reference in Section 11 to the descent of an allotment while it was still in trust status no doubt had reference principally to a parcel that was owned solely by the original allottee or several of his immediate heirs. When it enacted this provision, Congress obviously did not anticipate the events that have intervened since 1889, including the repudiation of the allotment policy, the indefinite extension of restrictions on the alienation of allotted lands, and the pressing problems occasioned by the ever-increasing fragmentation of ownership. Section 11 of the Sioux allotment statute therefore cannot be read to have disabled Congress from addressing these changed circumstances by invoking the reserved sovereign power to adopt reasonable rules, such as those in Section 207, that affect the descent and distribution of allotted lands.

It is significant in this regard that Section 207 does not affect the descent of substantial interests in allotted parcels that most closely resemble the interests that presumably were within the contemplation of Congress and the Indians in 1889, when ownership of any given allotment was expected to be vested in the allottee himself or divided among relatively few heirs. Rather, Section 207 affects only interests that do not represent any significant stake in the allotment and that actually frustrate the fulfillment of the goals of the allotment policy that Section 11 was intended to implement. Section 11 of the Sioux allotment statute should not be read to preclude Congress from taking appropriate steps to mitigate those unanticipated consequences. *Cf. Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

## II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE AMENDED VERSION OF SECTION 207 ALSO IS UNCONSTITUTIONAL, BECAUSE THAT VERSION DOES NOT APPLY TO ANY OF THE INTERESTS IN ALLOTMENTS OWNED BY APPELLEES' DECEDENTS

The court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. J.S. App. 17a.[27] The court did so even though all of the interests of the decedents in this case escheated pursuant to the original version of Section 207 (see J.S. App. 3a). And the court also did so without discussing any features of the latter provision—such as the new Subsection (b), which permits the owner of an otherwise escheatable interest to devise it to another owner of an interest in the same tract—that even more clearly establish that Section 207 does not impermissibly interfere with a supposed right to dispose of property at death.[28] Because there was no case or controversy regarding the application of the amended Section 207 to the parties before the court of appeals, the court had no authority to invalidate that provision. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980).

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[27] The original version of Section 207 was in effect from January 12, 1983, to October 30, 1984. The appellees' decedents all died within this period (J.A. 12-14). The Department of the Interior estimates that, on a nationwide basis, in excess of 4,000 interests escheated to Indian tribes during this period of less than two years.

[28] The effect and applicability of the 1984 amendments were not briefed prior to the decision of the court of appeals because the case was submitted to that court three weeks before the passage of the amendments. In the petition for rehearing (at 7-8), the Secretary argued, inter alia, that the panel's holding with respect to the amended version of Section 207 was gratuitous because the amendment had no application to the fractional interests at issue in this case. The court of appeals nevertheless denied the petition without comment (J.S. App. 19a).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1986

## APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517, 25 U.S.C. 2201 *et seq.*, is reproduced in its entirety at J.S. App. 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at J.S. App. 32a-36a.

a. Section 207 or the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendent [1] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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[1] So in original. Probably should be "descend".

b. Section 207 of the Indian Land Consolidation Act, as amended by the Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, and as codified at 25 U.S.C. (Supp. II) 2206, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by

intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

3. Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the

United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes." *Provided*, That the President of the United States may in any case, in his discretion, extend the period by a term not exceeding ten years; and if any lease or conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void: *Provided further*, That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered. Each of the patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

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No. 85-637

In The

# Supreme Court of the United States

October Term, 1985

DONALD P. HODEL,
SECRETARY OF THE INTERIOR

*Appellant,*

v.

MARY IRVING, ET AL.,

*Appellees.*

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR THE APPELLEES

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## QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in holding that 25 U.S.C. § 2206, as originally enacted and as amended, violates the Fifth Amendment because it does not provide for compensation to the estates of decedents for the land it declares to escheat.

## PARTIES TO THE PROCEEDING

The Appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross.

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No. 85-637

In The

# Supreme Court of the United States

October Term, 1985

DONALD P. HODEL,
SECRETARY OF THE INTERIOR

*Appellant,*

v.

MARY IRVING, ET AL.,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF FOR THE APPELLEES

Appellees accept those portions of the Brief for the Appellant entitled Opinions Below and Jurisdiction.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution; Section 207 of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459; Tit. II, 96 Stat. 2519, 25 U.S.C. 2206; the amended version of Section 207 of the Indian Land Consolidation Act enacted in Pub. L. No. 98-608, 98 Stat. 3173, 25 U.S.C. (Supp. II) 2206; Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891; Section 28 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 899; and Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635 are reproduced at App., *infra,* 1a-4a.

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## STATEMENT

Appellant, hereafter the government, has presented the history of the fractionated heirship problem, the statutory scheme and the proceedings in this case. Brief for the Appellant 2-16. However, the statement of this case must be supplemented to give the Court the perspective of the individual Indian decedents and their heirs and devisees.

The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2519, 25 U.S.C. 2201 *et seq.* (hereinafter ILCA) was passed by both houses of Congress in December of 1982. It was signed into law by the President on January 12, 1983. The memorandum instructing the local BIA agencies on implementation of the

escheat provision was sent out on March 2, 1983 (J.S. App. 37a-40a) and received at the Pine Ridge Agency on March 7, 1983 (Exhibit H to Complaint). The dates of death for appellees' decedents are as follows: Chester Irving, March 18, 1983 (Jt. App. 18); Geraldine Mary Poor Bear Little Hoop Cross, March 23, 1983 (Jt. App. 21); Edgar Pumpkin Seed, June 23, 1983 (Jt. App. 29); and Charles Leroy Pumpkin Seed, April 2, 1983 (Jt. App. 34). Therefore, decedents did not have sufficient time before their death to seek any of the remedies suggested in the memorandum to avoid the escheating of their property interests. Brief for the Appellant 10, 34-35. The ILCA did not provide any grace period which would have allowed the decedents to make gift conveyances, to apply for partitionment of a tract or to purchase additional interests from co-owners to increase the size of their interest in the tract. *See: Texaco Inc. v. Short,* 454 U.S. 516 (1982) (two year grace period after effective date of statute given to file claim to retain mineral interests.)

Geraldine Mary Poor Bear Little Hoop Cross, hereafter Cross, did in fact attempt to preserve for her five minor children her trust property interests. On March 16, 1983, Cross executed a Last Will and Testament leaving all her worldly goods to her five minor children (Exhibit D to Complaint). When Cross died on March 23, 1983, she possessed a total of fifteen parcels of trust land on the Pine Ridge Reservation subject to the Section 207 of the ILCA, 25 U.S.C. 2206, hereafter the escheat provision.[1]

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[1] The following discussion does not include the trust property interests that Cross possessed on the Rosebud Reservation. (Jt. App. 26-28).

Nine parcels had an aggregate estimated value of $1,192.91. Income for the preceding year totaled $100.56 for these parcels. (Jt. App. 22-25). Further, of these nine parcels that were subject to escheat, Cross's interest, while 2% or less of the total tract, amounted to approximately 3½ acres in Allotment OS-4542 Charles Little Hoop; 2 2/3 acres in Allotment OS-5161 White Horse Owner; 3½ acres in Allotment OS-5300 Holy In Center; 1½ acres in Allotment OS-5413 Take Pity On Them; and almost 2 acres in Allotment OS-5523 Joseph Little Loop.[2] In the other six allotted tracts, Cross had reserved mineral rights only, however, no attempt was made to appraise the value of these rights. (Jt. App. 13 at paragraph 13).

The escheat provision of the ILCA, as originally enacted, required that the decedents' trust interests which represented 2% or less of the total acreage of a tract and have earned less than $100 in the year preceding their death must escheat to the tribe. These are the interests that the government labels as "de minimis." However, 3½ acres or even ½ acre is certainly large enough to place a home or a garden upon. (Jt. App. 14 at paragraph 17). It is difficult to consider 3½ acres of land as a de minimis interest, even on the plains of South Dakota.

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[2] As pointed out by the government, Cross' smallest interest was on the Rosebud Reservation. Her interest in Allotment RS-4099 Yellow Hawk, was a 1/3645th interest in 320.12 acres, earning her 35 cents in the year before her death. However, the size of this one interest does not justify the government's characterization that the escheated interests of Cross and the other decedents were "insubstantial" (Brief for the Appellant 13), when other escheated interests are 3½ acres in size or earned as much as $51.10 in the preceding year. (Jt. App. 23).

The decedents should not be penalized for the fact that these property interests were not directly used or lived upon by them. Their lack of use is due in large part to the government's administration of trust lands. The interests are undivided ones in each tract of land. Therefore, the individual decedents, like Cross, did not have a specific 3½ acres designated in the tract as their own. The individual decedents would have had to apply for the partitionment of the tract to obtain specific acreage in that tract. Contrary to the government's suggestion to the Court that partitionment is a viable remedy (Brief for the Appellant 10 and 35), a request by the decedents for partitionment would have had almost no chance of success unless all heirs to the tract consented. *See Sampson v. Andrus,* 483 F.Supp. 240 (D.S.D. 1980).

The government seeks to convince the Court that the IICA is Congress' very best effort to deal with the difficult fractionated heirship problem. However, the Brief of *Amicus Curiae* Yakima Indian Nation demonstrates that there are alternatives to the escheat provision of the IICA. The Yakima Nation since 1970 has purchased the trust interests of members and non-members not capable of inheriting them because the individuals lacked the necessary one-fourth blood quantum of the antecedent tribes and bands. These purchases were required by a Congressional amendment to the Act of August 9, 1946, ch. 933, Sec. 7, 60 Stat. 968 (codified as amended at 25 U.S.C. 607). The amendment was premised upon rectifying what Congress considered unfair: the tribe acquiring interests without compensation being paid to the individual Indians for them. See Brief of *Amicus Curiae* Yakima Indian Nation 2-3.

Congress implicitly determined, by its passage of the ILCA, that it did not intend for the government to pay compensation for the escheated property interests. Brief for the Appellant 25, f.n. 16. However, one goal of the ILCA is to reduce the administrative costs of the government in maintaining the records for fractionated heirship land. Senate Rep. 98-632, 98th Congress, 2d Session, p. 3 (1984). Therefore, it would not be unreasonable to require the government to pay compensation for the escheated interests. In fact, it would even be cost beneficial. The government, by compensating for each escheated piece of property, would be relieved of the costly administrative tasks of computing the fractional interests of the decedent's heirs and devisees.

Further, as is explained above, appellee's decedents had no fair opportunity to avoid the effects of the escheat provision. ILCA went into effect on January 12, 1983 with no grace period or meaningful notice to individuals that their individual property interests would be extinguished upon death and transferred to the tribe.

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## SUMMARY OF ARGUMENT

The escheat provision of the ILCA effects a taking of vested property interests held by the individual Sioux decedents without just compensation in violation of the Fifth Amendment.

A. The Sioux decedents had vested property rights in their fractionated heirship land based upon the agreements reached and the circumstances surrounding the allotment of

the Great Reservation of the Sioux. Included in their vested property rights was the right to pass their property upon death.

The Great Reservation of the Sioux was allotted only after negotiations and agreements were reached between the federal government and the Sioux Indians, hereafter Sioux. The Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.* only became effective upon the consent of the Sioux male population. In fact, this was the second act passed to allot the Sioux Reservation. The Act of April 30, 1888, ch. 206, 25 Stat. 94 *et seq.* lapsed after failing to gain the required approval of the Sioux. As a result of objections raised by the Sioux to the 1888 Act, material changes were placed in the 1889 Act.

Both the material changes made in the 1889 Act and the concerns expressed by the Sioux to the commissions, seeking their approval, demonstrate their concern for the future of their children and children's children and the desire to preserve a land base for them. The Sioux understood that by agreeing to the allotment and relinquishing their claim to all tribally held land, they were securing for themselves, their children and grandchildren land which could not be taken away, even by Congress. The Sioux obtained assurances from the commissions in both 1888 and 1889 that they correctly understood that their allotments would be theirs to pass upon death to their children, passing down through the generations. The Act of 1889 must be construed as the "unlettered" Sioux understood it and as "as justice and reason demand." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 406, f.n. 2 (1968). Therefore, the Act of 1889 must be construed to include the right to pass these property interests upon death.

This right to pass property at death vested in the allottees and their successors in interest upon their relinquishment of any claim to tribal lands. The bargain of the federal government and the Sioux is materially indistinguishable from the "bargained for right" of a tax exemption found by the Court in *Choate v. Trapp*, 224 U. S. 665 (1912). In *Choate*, an agreement was first reached between the federal government and the Choctaws and Chickasaws which was later incorporated bodily into a statute. Part of the agreement there was that in consideration for their tax exempt allotments, the Choctaws and Chickasaws would relinquish their claims to tribally held lands. Therefore, the Court found that each allottee had gained a vested right in the tax exemption since the individual allottee had received his allotment only on the condition that he relinquish his interest to all tribally held property.

The Sioux negotiated with the federal government and their agreements were embodied in the Act of 1889. The Sioux allottees obtained allotments which would pass upon their death to their families and in return, they relinquished any claim to formerly tribally held lands. These allottees gained vested property rights in their allotments of a contractual nature which included the right to pass their property upon death. The Sioux decedents as successors in interest to the original Sioux allottees held this vested property right to pass their property upon death. It is this right to pass property that is extinguished by the escheat provision of the ILCA.

B. The escheat provision takes the Sioux decedents' vested property interests in violation of the Fifth Amendment to the Constitution. The result of the escheat provi-

sion is that the fractionated heirship lands held by the decedents are conveyed to the tribes upon their death. The decedents' title and control of these interests are extinguished.

1. The decedents as individual Indians are guaranteed protection for their vested property interests under the Constitution. In *Choate,* the Court defined the protection to be afforded vested property rights held by individual Indians: "to the same extent and in the same way as other residents or citizens of the United States." *Id.* at 677. Therefore the decedents' vested property interests are protected by the Fifth Amendment to the Constitution. The Fifth Amendment forbids the taking of private property for a public use without paying just compensation. Here, the decedents upon death had their property interests extinguished and conveyed to the tribes under the dictates of the escheat provision of the ILCA. The right of the Sioux to pass their property upon death was "taken". The contractual nature of this right puts it outside of Congress' usual authority to regulate the descent and distribution of Indian property and insures it Fifth Amendment protection.

2. The escheat provision does not regulate the decedents' property interests, it takes them. This provision extinguishes these individually held property interests upon the decedents' death.

The government tries to squeeze the facts here into the context of regulatory taking cases, such as *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and *Andrus v. Allard,* 444 U.S. 51 (1979). However, the facts here are not analogous to these regulatory taking

cases. In *Allard,* the owners of protected bird parts were deprived only of their right to sell these parts. The owners retained possession, use and the ability to devise their bird parts. In *Penn Central,* the owner of Grand Central Terminal was restricted only from building a multistory structure on the terminal. Here, the Sioux decedents completely lose their property interests. This is not regulation, but the taking of an interest.

Even if a regulatory taking analysis is applied to the facts here, the nature of the government's action in the escheat provision "chops through the bundle [of property rights], taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982). Thus there is a taking even under a regulatory analysis. The escheat provision must be recognized as a taking, otherwise there will be nothing to prevent Congress from increasing the size of the interests to escheat and threatening the extinction of property interests held by individual Indians.

C. That Congress sought to fulfill public purposes with the escheat provision is conceded. Though it is not conceded that the public purposes will be accomplished by this provision.

D. Finally, it is clear from the face of the ILCA, as originally enacted and amended, that no compensation is paid for the interests escheating to the tribes. Congress has attempted to rectify the problems created by its allotment policy. However, its solution will further penalize the real victims of the allotment policy, the Indian people, by taking their property interests without paying just compensation. This violates the Fifth Amendment.

## ARGUMENT

### I. THE ESCHEAT PROVISION OF THE INDIAN LAND CONSOLIDATION ACT OF 1983, AS ENACTED AND AS AMENDED, DOES EFFECT A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

In deciding this case the Court is required to look sequentially at four questions. *Ruckelshaus v. Monstanto Co.*, —U.S.—, 104 S.Ct. 2862, 2872 (1984). The first inquiry is whether or not decedents had a vested property interest in their undivided fractional interests of allotted land. The Sioux decedents did have such a property interest based upon the circumstances and nature of the agreement between the Sioux and the federal government embodied in the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.* That vested property interest included the right to pass property upon death.

Upon finding a protected property interest the next inquiry is whether or not the escheat provision of the ILCA has "taken" these protected property interests by transferring them to the Oglala Sioux and Rosebud Sioux Tribes. The holding of *Choate v. Trapp*, 224 U.S. 665 (1912) is controlling precedent that there has been a Fifth Amendment taking here. Further the escheat provision is not the "carefully tailored regulatory measure" portrayed by the government. Brief for the Appellant 28.

When there is a taking, the next inquiry is whether or not the taking was for a public use. Appellees concede that there are valid public purposes behind the escheat

provision of ILCA: to consolidate Indian lands and reduce the costs of the government in administering these fractional interests.

The final inquiry is whether or not there is just compensation paid for the protected property interests that escheat to the Oglala Sioux and Rosebud Sioux Tribes. From the face of the statute, as enacted, it is clear that there is no provision for compensation to the individual Indian's estate for the interests that escheat to the tribe. This is equally true under the escheat provision, as amended, if an individual Indian dies intestate or does not devise his escheatable interests to the owner of another fractional interest in the same tract.

The application of *Ruckelshaus* to the facts of this case leads to one conclusion: the escheat provision of the ILCA, as originally enacted and as amended, violates the Fifth Amendment by taking decedents' right to pass property upon death without compensation.

### A. The Decedents Held Vested Property Interests Under the Act of March 2, 1889, Which Included Right to Pass Their Property Upon Death.

The court of appeals correctly held that the Sioux decedents, as successors in interest to the original Sioux allottees, had a vested property right to pass their property upon death. (J.S. App. 16a). The court of appeals held that the appellees as potential heirs and devisees had no vested rights in the fractionated trust land at issue here. (J.S. App. 12a) Appellees were, however, granted standing to raise their decedents' claim of a Fifth Amend-

ment taking.[3] (J.S. App. 13a-15a). The court of appeals found that the statute allotting the Sioux was in the nature of a "bargain" under which the individual Sioux allottee (and his successors in interests) obtained the right to pass his interest in his allotment at death to "his children", and "children's children" in return for the allottee's relinquishment of all claims to lands formerly held in common as tribal property.[4] (J.S. App. 16a) This finding of a vested property interest is firmly grounded on the historical circumstances surrounding the allotment of the Great Reservation of the Sioux Nation. Further, the court of appeals' construction of the statute allotting the Sioux is in accord with sound canons of construction developed by this Court.

The Act of March 2, 1889, declared that the Great Reservation of the Sioux Nation, comprising most of what

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[3] The court of appeals was correct in finding that the appellees have standing to bring this lawsuit. Clearly, the decedents do not have the ability to assert their own right in their fractionated heirship land. The escheat provision operates only upon the owners' death, thus depriving the owners of the opportunity to challenge it during their lifetime. Such a deprivation allows the Court to abandon the normal rule of practice that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). Further, the relationship of appellees, as heirs and devisees, to the decedents is adversely affected by the escheat of these property interests. *See Singleton v. Wulff,* 428 U.S. 106, 114-116 (1976). The appellees on appeal seek only to establish the vested property interest of their decedents.

[4] The "bargain" with the Sioux is distinguishable from the situation of tribes who were allotted under the provisions of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.* Those tribes did not negotiate or consent to the allotment of their lands. *See* Brief *Amicus Curiae* of the Sisseton-Wahpeton Sioux Tribe p. 2.

is now South Dakota, west of the Missouri, would be allotted to individual Sioux (§ 8, 25 Stat. 890). The Act also provided for the release of Indian title (§ 16, 25 Stat. 893) and all surplus lands to be opened to non-Indian settlers (§ 12, 25 Stat. 892). However, the Act would only be implemented if accepted and consented to by three-fourths of the adult male Indian population as prescribed by the twelfth article of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635. (§ 28, 25 Stat. 899, App. 3a).

The circumstances surrounding the approval of the 1889 Act are relevant in determining the meaning of the Act's words. *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87 (1918). A commission was sent to the Great Reservation of the Sioux Nation to obtain the required approval of the adult male population in 1889. This was the second such commission sent to meet with the Sioux. The first one unsuccessfully sought approval of the Act of April 30, 1888, ch. 206, 25 Stat. 94 *et seq.* which also provided for the allotment of the Sioux. Because the approval of three-fourths of the adult male population was not obtained, the Act of April 30, 1888, was rendered null and void by its own terms. (§ 24, 25 Stat. 104).

In the 1888 commission report, two of the major objections to the 1888 Act raised by the Sioux were whether there would be sufficient land for their children and a fear that the federal government was not acting fairly with this legislation, since it had not been fair in its past dealing with the Sioux. Senate Exec. Doc. No. 17, 50th Congress, 2d Session, at 6-7 (1889). The Sioux's objection to allotments of 160 acres for a head of family in the

1888 Act resulted in doubling the size of allotment for that group in the 1889 Act.[5] This increase was obviously designed to address the Sioux's concern that there be sufficient land for their children. The Sioux also obtained increased revenues in the 1889 Act which specifically increased the funds available to educate and train their children. The increased price per acre of surplus lands provided for in 1889 Act (§ 21, 25 Stat. 896) increased revenues of the permanent fund created by that Act.[6] Half of that fund was designated for "promotion of industrial and other suitable education". (§ 17, 25 Stat. 895). It is rational to assume the result of a larger fund would be increased education and self-sufficiency for allottees, their children and children's children. Ultimately, the Sioux sought to insure the preservation of a land base for future generations.[7]

The Sioux were given explicit assurances by the 1889 commission that their rights to their allotments would not

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[5] This was also double the amount of acreage received by heads of household under the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq*.

[6] The permanent fund was also increased from one million dollars in the proposed 1888 Act (§ 17, 25 Stat. 101) to three million dollars in the approved 1889 Act. (§ 17, 25 Stat. 895).

[7] At a council meeting held at the Standing Rock Agency with the 1888 commission Call stated:

> "I do not want to consider the sale of this land only with a view to one generation. There are lots of children here growing up and I want to retain the land for them."

S.Exec. Doc. 17, *supra*, at 108.

diminish.[8] These assurances are significant given the Sioux's misgivings about the fairness of the federal government's past dealings.

General Crook:

> "The great trouble with the other treaties was that they did not give the Indians patents for their land, and now this treaty gives you papers for your land, that nobody can take away from you. [Applause.] Your taking a patent for it takes it out of Congress, and they can't make any change in it."
>
> Senate Exec. Doc. No. 51, 51st Congress, 1st Session, at 54 (At the Rosebud Agency, Dakota, June 7, 1889).

Bear Nose:

> "My understanding is with the Commissioners, and when you take this back to the Great Father, and we have agreed to let you have this you have

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[8] Similar assurances had been given to the Sioux by the 1888 commission which was unsuccessful in acquiring the approval required by the Act of 1888:

Major Anderson:

> "I want to give you an illustration of the relative proportion of land you will have after disposing of that part asked for in the bill. Here is a 2-foot rule with four equal divisions on it. That division represents the land that has already been taken and for which you have certificates. You will have three other parts left to give to your children and grandchildren and great-grandchildren and for pasture if you want it, and you will be separate from all other people and they will have no right to dispose of any part of the remainder. You will have this land fixed to you *forever.*" (Emphasis added) Sen.Exec. Doc. 17, *supra,* at 145 (At the Crow Creek Agency, Dakota, August 30, 1888).

> spoken for, and we take our land in severalty, nobody can come up and take our land away from us. That is my understanding."
>
> General Crook:
>
> "That is right."
>
> S.Exec. Doc. No. 51, *supra,* at 111 (At the Pine Ridge Agency, Dakota, June 21, 1889).

These entries reflect the Sioux's understanding that upon death they could pass their allotments to their families without the fear that anyone, even the federal government, would take them away.[9] Based on the commissioners' assurances to the Sioux that this understanding was correct, the Sioux accepted and consented to the allotment of their lands and the relinquishment of claim to tribal lands. Only then did the Act of March 2, 1889 become law.[10]

Congress eventually passed the Act of June 25, 1910, ch. 421, § 2, 36 Stat. 855 (codified as amended at 25 U.S.C. § 373 (1983)). With this Act, Congress "sought to fill gaps and deficiencies in the administration of estates of

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[9] There was some discussion of Congress' power of eminent domain, to take land "no matter to whom it belongs, provided they pay the owners for its use or taking it. . ." Agent Galligher of Pine Ridge Agency. S.Exec. Doc. No. 51, *supra,* at 70. However, this action was compared to the taking of an individual white man's land taken for the needs of the government for which compensation of a fair price was paid. Governor Foster. S.Exec. Doc. 51, *supra,* at 76.

[10] "The deed submitted herewith is executed and signed by 4,463 being over ¾s of the adult male Indians occupying or interested in the Great Sioux Reservation; the whole number being 5,678." Letter from Secretary of Interior John W. Noble, January 30, 1890 to President Benjamin Harrison. S.Exec. Doc. 51, *supra,* p. 8.

allottees", F.Cohen, *Handbook of Federal Indian Law*, 134 (1982 ed.), by expressly stating that allottees have the right to pass their interests by will. It is reasonable to conclude that the ability to will property specified in the Act of 1910 was a part of the original 1889 bargain between the Sioux and federal government.[11] The Sioux were told that they would hold these allotments according to the laws of the white man and in 1889 the laws provided a white man with the right to make a will.

It is true that the right to pass gained by the allottees and their successors in interest under the Act of March 2, 1889, has been tempered by certain later restrictions.[12] Brief for the Appellant 18, f.n. 18. However, the right to pass their interest has always remained intact.[13] The

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[11] In fact one entry in the 1888 Commission report alludes to the Sioux's ability to make a will.

Rev. Cleveland:

> "And at any time afterwards, when you die, your land will go to your children. And if you do not *tell before you die how you want your land to be divided* among your children, then it will be divided among them according to the white man's law." (Emphasis added) S.Exec. Doc. 17, *supra*, at 139 (At the Crow Creek Agency, Dakota, August 29, 1888).

[12] These restrictions more closely resemble the regulatory taking described by the government, (Brief of Appellant pp. 28-36) than does the escheat provision of the ILCA which *extinguishes* the Indian decedent's property interest at death.

[13] The right of decedent to pass property also remained intact in *Jefferson v. Fink*, 247 U.S. 288 (1918). In *Jefferson*, the heirs of the decedent were attempting to claim a vested property right in having the decedent's estate pass to them by Arkansas law. The property of the decedent did pass, but under Oklahoma law.

allotted interests have remained with the Sioux decedents' families and have remained individually held property.

A contrary result occurs under the escheat provision of the ILCA which extinguishes the Sioux decedent's interest in his fractionated property interest upon death. The ILCA effectively converts the decedent's interest from a fee interest to a life estate.[14] This result was not contemplated by the Sioux when they consented to allotment under the Act of March 2, 1889. *See supra,* pp. 15-17.

The escheat provision of the ILCA is an attempt by Congress to rectify its failed allotment policy which has created an administrative nightmare for the BIA and has restricted the use of this land by the allottees and their successors, here the decedents. But the escheat provision is a plan which is unfair to the decedents with small interests. These decedents are not only hampered during their lifetime in the enjoyment of their interests by their undivided status (*See supra,* p. 5), but when they die the government takes their interests completely, with no compensation to their estates, which means no compensation to their heirs and devisees. This is exactly the type of situation the Sioux feared would happen when they refused to ratify the Act of April 30, 1888 and what they thought they were protected against by the Act of March 2, 1889.

The Sioux allotment, reflected in the Act of 1889, is based on a bargain between the Sioux and the federal gov-

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[14] 'The right of the Indians to the occupancy of the land pledged to them may be one of occupancy only, but it is "as sacred as that of the United States to the fee." ' (Cites omitted). *Shoshone Tribe of Indians v. United States,* 299 U.S. 476, 497-498 (1937).

ernment. The Sioux agreed to release their common claims to tribal lands and the federal government agreed to give the Sioux allotments in severalty. It was mutually agreed between the parties that one of the characteristics of the individual property interest was that it would endure and pass to the owner's children or family members. It is this vested right that the escheat provision of the ILCA took when it extinguished the Sioux decedents' interests in their fractionated heirship land.

The court of appeals recognized the bargain between the federal government and the Sioux as indistinguishable from the "bargained for right" of a tax exemption in *Choate v. Trapp*, 224 U.S. 665 (1912). In *Choate*, Choctaws and the Chickasaws entered into the Akota Agreement with the Dawes Commission. That Agreement was then embodied in the Curtis Act of June 28, 1898, ch. 517, 30 Stat. at 505. Under that agreement, each tribal member was to receive an allotment which was to be non-taxable for a limited period of time. As consideration for the allotment, each tribal member relinquished his interest in all commonly held tribal property. The situation in *Choate* is materially indistinguishable from the situation in the present case.[15]

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[15] In the case of the Sioux, the Act of April 30, 1888 was passed; a commission took the Act to the Sioux for approval; approval was not obtained; material changes were made in the Act of March 2, 1889 to address objections of the Sioux; a commission took the Act of 1889 to the Sioux, and over three-fourths of the adult male Indians occupying or interested in the Great Sioux Reservation agreed to the Act and executed a deed implementing the Act of March 2, 1889. The Sioux received allotments and in return relinquished all claim to the tribally held lands.

The Sioux by their consent to allotment and relinquishment of claim to tribally held land gave consideration for the individual allotments each member received. The agreement between the Sioux and the federal government was in the form of a contract with consideration given by both sides. The agreement gave the Sioux contractual rights which are legally enforceable against the government here. Based upon the reasoning in *Choate,* the original allottees and their successors, the decedents here, obtained vested rights in their individually held allotments. One of those rights vested in the Sioux with allotment was the right to pass their allotments upon death.

The court of appeals recognized the "bargained for" nature of the vested property rights in *Choate:* "that each allottee had gained a vested right . . . because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property." (J.S. App. 15a). Then the court of appeals correctly applied the logic of *Choate* in holding that the Sioux obtained under the Act of March 2, 1889, vested rights including the right to pass property acquired by allotment upon death. The Indian decedents here had a vested right to pass property upon their death based upon the reasoning of *Choate* and the circumstances surrounding the enactment and approval of the Act of March 2, 1889.

The government argues that the word "heirs", found in Section 11 of the 1889 Act (25 Stat. 891) must be interpreted in a technical, legalistic way and that such an interpretation defeats the vested property interests of the decedents to pass their property upon death. The proper ap-

proach is to look "to the substance of the right, without regard to technical rules". *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 406, f.n. 2 (1968). The Sioux were told and understood that the language of Section 11 (App. 2a-3a) meant their property interest in allotment would pass to their families, *i.e.* when they died a member of their family would then own the land and have the right to pass it on at the time of death. They were told their allotted interests would stay in their family.

General Crook:

> "There is only one way to do that and that is to take your land in severalty and have it surveyed and get a deed for it. When you get a deed for your land nobody can take it away from you and your children afterwards. As long as you keep it in common as you do now you are liable to be legislated out of it just as you have been in the past. And those who have children and care for them should think well of this before you decide what you will do."
>
> S.Exec. Doc. No. 51, *supra,* at 85 (At Pine Ridge Agency, Dakota, June 17. 1889).

The Sioux would not have attached significance to the distinction between "heirs at law" as compared to "heirs testamentary" nor appreciated the word "descent" as a term of art designating intestate succession. The Act of 1889 must be construed as the "unlettered" Sioux understood it and "as justice and reason demand." *Menominee Tribe, supra.*[16] The assurances made by the 1889 Com-

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[16] F.Cohen, *supra,* at 224, f.n. 60 (1982 ed.). "That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders

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missioners are relevant to the Sioux's understanding of the 1889 Act and that understanding must control the construction given the Act of 1889. *Menominee Tribe.* A proper construction of Section 11 of the 1889 Act is that the Sioux were given the right to pass their property interests gained by allotment upon their death to their families.

The government also argues that the rights acquired under the Act of 1889 are not of a contractual nature and therefore not vested property rights. First, the government seems to urge that *Choate* is not applicable because the tax exemption granted to the Choctaws and Chickasaws was for a limited period of time. Brief for the Appellant 38. That the right created by the bargain in *Choate* is of limited duration does not mean *Choate* is inapplicable to the bargain of the Sioux. The relevance of *Choate* is that the allottees, individual owners of allotted lands, possessed a vested property right to the tax exemption as a result of a bargain. It is not the details of the bargain that determine *Choate's* relevance or applicability to this case. Further, the fact that in *Choate* the specific language of the Curtis Act confers the tax exemption and the 1889 Act does not specifically mention the right to pass these property interests, does not defeat Appellee's claim that the right to pass property was a vested right under the Act of March 2, 1889. *See supra,* pp. 15-17. The Sioux bargained

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and statutes, neither of which directly involve negotiations with the tribes."

*E.g. Carpenter v. Shaw,* 280 U.S. 363 (1930); *Marlin v. Lewallen,* 276 U.S. 58 (1928); *Starr v. Long Jim,* 227 U.S. 613 (1913); and *Choate v. Trapp,* 224 U.S. 665 (1912) where this rule was applied to statutes based upon Indian consent.

for and understood that the property interests gained in allotment would pass upon death to their families.

The government next cites *National Railroad Passenger Corp. v. Atchison, T.&S.F. Ry.*, — U.S. —, 105 S.Ct. 1441 (1985) in urging that the Act of March 2, 1889, confers no contractual rights upon the Sioux. Brief for the Appellant 39. The Sioux decedents' rights arise from a very different setting from that under review in *National Railroad*. Congress had long regulated the railroads and there is no discussion of negotiations, agreements or required consent in regard to the disputed legislation in *National Railroad*. Further, it is important to note that *National Railroad* recognizes the need to look beyond the language of the statute to the circumstances of the enactment. *Id.* at 1453.

The government argues that the Act of March 2, 1889 simply declares a policy to be pursued until Congress ordains another policy. However, to view the 1889 Act allotting the Sioux as a mere policy statement ignores the negotiated agreements between the Sioux and federal government and that the Act became effective only after it was approved by three-fourths of the Sioux males.

The government is asking the Court to view the Sioux allotment process with tunnel vision. That is certainly not appropriate when construing agreements between the federal government and Indians embodied in legislation. *Menominee Tribe, Alaska Pacific Fisheries.* The bargaining process between the Sioux and the federal government vested rights of a contractual nature in the Sioux, including the right to pass property upon death.

### B. The Decedents' Vested Property Interests Have Been Taken in Violation of the Fifth Amendment.

#### 1. The Decedents as Individual Indians with Vested Property Interests Were Guaranteed Protection for These Property Interests Under the Fifth Amendment.

The decision by the Court in *Choate* is also important because it defines the protection to be afforded vested property rights held by individual Indians:

> There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent in the same way as other residents or citizens of the United States.

*Id.* at 677.

The court of appeals correctly found under *Choate* that the decedents' vested property interests were protected by the Fifth Amendment to the Constitution. As a consequence, the court of appeals held the escheat provision of the ILCA unconstitutional because it takes the decedents' property without compensation. (J.S. App. 16a-17a). This holding is consistent with *Choate* which states that:

> Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced *his fee to a life estate or attempted to take from him 10 acres,* or 50 acres, or the timber growing on the land . . . It is con-

> ceded that no right which was actually conferred upon the Indians can be arbitrarily abrogated by statute.

*Id.* at 674. (Emphasis added).[17]

The decision of the court of appeals rests squarely upon *Choate* which has been consistently adhered to by both lower federal courts and the Court.[18] In short, Indian allottees and their successors in interest have judicially established constitutionally protected property rights in individually owned allotments. This has been consistently reiterated and entrenched in the decisions of the Court so much so that no legitimate challenge may now be raised.

The government fails to appreciate the distinctions between an individual Indian's property and tribal property and the distinctions between personal status and prop-

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[17] *Choate* refutes the argument of the government based upon *Andrus v. Allard*, 444 U.S. 51 (1979). Brief for the Appellant 34-35. The government argues that the denial of one traditional property right out of a full "bundle" of property rights may not always amount to a taking. However, the "strand" that the escheat provision takes is the right to pass the property upon death. This converts the decedents' property from a fee interest to a life estate in violation of the Fifth Amendment under the explicit language of *Choate*. The decedents' title to and control over their property interests was extinguished upon their death.

[18] *E.g. Mott v. United States*, 283 U.S. 747, 752 (1931); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930); *Morrow v. United States*, 243 F. 854, 856 (8th Cir. 1917); *Bryan County, Oklahoma v. United States*, 123 F.2d 782 (10th Cir. 1941); and *United States v. Nez Perce County*, 95 F.2d 232, 235 (9th Cir. 1938).

erty rights.[19] These distinctions are crucial to this case which is solely concerned with individually held property. Congress' broad powers to re-allocate Indian property as it affects property held by individual Indians are limited by the Fifth Amendment. *Gritts v. Fisher*, 224 U.S. 640 (1912), considered during the same term as *Choate* and decided on the same day as *Choate*, held that individual Indians have no vested rights in tribal property. At the same time, the Court in *Gritts* expressly disclaimed any authority in Congress to re-allocate individual Indian property in light of *Choate*.

*Choate* and *Gritts* established that Congress may not indiscriminately exercise control over reservation lands. Rather, the extent to which Congress may exercise control over such lands depends upon the type of ownership of the land. Congress may re-allocate benefits of tribal land as it sees fit.[20] But as to individual property, such as the property at issue here, Congress may only manage

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[19] *See* Brief for the Appellant 24-25. In *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), it was held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to his person status not a property right, a conclusion expressly noted by the Court in *Choate*. "Nothing that was said in *Tiger* . . . is opposed to the same conclusion here. For that case did not involve property rights. . . ." *Id.* at 678. In *United States v. Kagama*, 118 U.S. 375 (1886), the power of Congress is established to regulate the personal conduct of Indian people by federal criminal prosecutions.

The remaining cases cited by the government deal with tribal land, not individually owned land, and fall under the *Gritts* rule, *infra*.

[20] *E.g. Gritts; United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972); and *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

it, subject to the constitutionally protected property rights of individual owners.

The government also fails to recognize the contractual nature of the rights acquired by the Sioux through allotment. Rights arising from "valid contracts are property . . . Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States,* 292 U.S. 571, 579 (1934), *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 19, f.n. 16 (1977). The contractual nature of the right to pass property upon death held by the Sioux decedents, there, places this right outside of Congress' usual authority to regulate the descent and distribution of interests in Indian property. *See* Brief for the Appellant 24-28.

The plenary powers of Congress authorize it to pass legislation to address the fractionated heirship problem. Brief for the Appellant 2-9. Such legislation must "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 85 (1977). But these broad plenary powers are specifically limited to protect the constitutional rights of individual Indians. The Court in *Choate* specifically addressed this issue and found:

> [t]here was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment.

*Id.* at 678.

The individual decedents each had vested property interests in allotted land subject to escheat under the defi-

nitions of the ILCA. (*See* Jt. App. 18-39) Upon death, each individual decedent's interests in these parcels were conveyed to the Oglala Sioux or Rosebud Sioux Tribes pursuant to the escheat provision of the ILCA. The individual decedents suffered a "taking" within the meaning of the Fifth Amendment.

### 2. The Escheat Provision Is Not A "Carefully Tailored Regulatory Measure".

The government misdirects the Court's attention when it urges that the Court focus only on the "narrow category of de minimis interests in property" in determining whether the escheat provision of the ILCA violates the Fifth Amendment. Brief for the Appellant 29. The Court has held that the size of the interest taken is not a determinative consideration in the analysis of whether or not there has been a Fifth Amendment taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-7 (1982). In *Loretto,* the Court found a Fifth Amendment taking where a cable TV company's cable and installations on landlord's building occupied about one and a half cubic feet. Here, the property interests are considerably larger than one and a half cubic feet; for example, decedent Cross had two interests each approximately 3½ acres in size.

The Court has also rejected the suggestion that a secured party with less than a fee simple interest has an insubstantial interest. While a smaller "bundle of rights" obviously accrues, it does not make the interest "something less than property." *United States v. Security Industrial Bank*, 459 U.S. 73, 76 (1982). The size of the interest is relevant to the amount of compensation due, not

to whether there is unconstitutional deprivation of private property. *Loretto.*

The government also misdirects the Court by squeezing the facts of this case into the regulatory taking analysis under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and *Andrus v. Allard*, 444 U.S. 51 (1979). The escheat provision does not merely regulate the use of these property interests. It effects a total forfeiture.

The government analogizes the decedents' loss of the right to pass property upon death to the loss suffered by the owners in *Allard.* There the property interests which were the subject of the litigation were parts of protected birds. The Court found in *Allard* that a regulation prohibiting the sale of these bird parts did not run afoul of the Fifth Amendment. The Court held that the restrictions on sale did not constitute a taking since the owners could still retain, donate or devise their property. *Id.* at 66-68.

The strand in the bundle of property rights held by the Sioux decedents and taken by the escheat provision of the ILCA is the right to pass the property upon death. Because the result of taking this "strand" is to extinguish the property interests of the decedents, *Allard* is distinguishable. In *Allard,* the bird parts remained in the owner's possession. There was a limitation imposed upon what use the owner could make of these bird parts, but he was not deprived of them or all beneficial use of them.[21]

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[21] Similarly in *Penn Central,* the owner was not deprived of its ownership of the Grand Central Terminal. Rather the use of this property was regulated preventing the construction of a multistory structure on top of the terminal.

*See Loretto*, 458 U.S. at 433, f.n. 10. Here, Sioux decedents upon death completely lose their property interests. The rules of law developed to address governmental action resulting in the permanent physical deprivation or the destruction of all beneficial use of property are applicable to the decedents' deprivation rather than *Allard*.

Where there has been a permanent physical occupation of property, the Court has consistently "found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35. Here, upon the death of the decedents, the Oglala Sioux Tribe and the Rosebud Sioux Tribe obtain permanent control and physical occupation of decedents' fractionated property interests.

It is not fatal to the "taking" inquiry, as the government implies (Brief for the Appellant 31), that the tribes rather than the government receive the property interests that escheat. While the "classical taking" is by the government for its own use, the cases of the Court show that a taking can be found where the government's action results in the property interest going to a third party. *Security Industrial Bank* (benefit of federal bankruptcy law goes to individual debtors). *See also: Loretto* (benefit of city regulation flows to cable TV company) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (benefit of state enactment to private landowners). It is clear here that government action by federal statute, the ILCA, has caused the decedents' property interests to be extinguished, by granting the permanent occupation and control of those property interests to the tribes. This

is a taking under the Fifth Amendment requiring compensation. *Loretto.*

Even if the extinguishment of the Sioux decedents' property interests at death does not fit exactly the Court's permanent physical occupation analyses, the regulation of these interests under the escheat provision of ILCA amounts to a taking. The "nature of the government action" here requires finding a "taking" has occurred irrespective of either economic impact or interference with investment back expectations. *Penn Central,* 438 U.S. at 124. The nature of the governmental action can be controlling where "it chops through the bundle [of property rights], taking a slice of every strand." *Loretto,* 458 U.S. at 435. The result of the escheat provision is the extinguishment of a property interest which takes away every strand in the bundle of rights an owner acquires with property. This is a taking even under a regulatory taking analysis.

As a general principle, the Court has recognized that regulation can effect a Fifth Amendment taking. *Kaiser Aetna v. U.S.,* 444 U.S. 164, 178 (1979); *Mahon.* In determining that a regulation amounted to a taking, the Court recognized as a fundamental attribute of ownership, the "right to exclude" *Kaiser,* 444 U.S. at 179-180. The right to pass property upon death is a similar fundamental attribute of ownership. Just as in *Kaiser* the Court protected the property owners from the temporary invasion of their dredged pond, the Sioux decedents should be protected from having their property interests permanently invaded upon death. The invasion in this case is limited to a specific time frame, *i.e.* after death, but that invasion

is no less onerous than a temporary invasion of a pond. Also the Court considered expectations of the landowners in *Kaiser,* and it is appropriate to consider the Sioux decedents' established expectations to pass their property upon death here. *See supra* pp. 15-17. The "carefully tailored regulatory measure" here regulates individually held property out of existence and should be recognized as a taking under the Fifth Amendment.

The government also urges that the escheat provision of the ILCA is "rationally tied to the fulfillment of Congress' unique obligation toward the Indians." Brief for the Appellant 17. However, determining if an enactment is "rational" is quite a separate inquiry from whether it takes property in violation of the Fifth Amendment. *Security Industrial Bank.* It is clear under the holding of *Choate,* that property held by individual Indians is protected by the Fifth Amendment from Congress' enactments. Whether the escheat provision is a rational use of Congress' legislative powers is more appropriately addressed when considering if the provisions has a valid public purpose. It is not germane to determining if there has been a taking of the Sioux decedents' property interests. The words of Justice Holmes in *Mahon* ring particularly true when considering the escheat provision of the ILCA.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.
>
> . . .
>
> When this seemingly absolute protection is found to be qualified by police power, the natural tendency of human nature is to extend the qualification more

> and more until at last private property *disappears*. But that cannot be accomplished in this way under the Constitution of the United States. (Emphasis added).

*Mahon*, 260 U.S. at 415.

The government urges that the escheat provision should be examined only in the narrow context of de minimis land interests, *i.e.* interests representing 2% or less of the total acreage of the tract and having earned less than $100 in the year prior to death or under the amended value provisions effective October 30, 1984. However, even in this narrow context, these individual property interests are *disappearing*. The government stresses that there is no "blanket prohibition against the passing of all interests in trust or restricted allotment to private individuals by intestacy or devise". Brief for the Appellant 29. But, if this provision is not recognized as the taking it is, then there is no safeguard to prevent Congress from increasing the percentage of the interest in the tract from 2% to 5% to even 100%.

### C. The Escheat Provision Was Intended to Be a Taking For a "Public Purpose."

Appellees do not agree with the method chosen by Congress, the escheat provision, to alleviate administrative costs and consolidate land holdings. Nor are they convinced that they will benefit by Congress' scheme.[22]

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[22] Neither was the district court convinced of any benefit to individual tribal members as a result of the ILCA:

> The argument that this result will benefit the Indian population as a whole is simply not valid in this Court's

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*See* Brief for the Appellant 18-19 discussing "reciprocity of advantage." However, the proper inquiry before the Court is not whether the legislation under scrutiny will in fact accomplish its stated goals. The Court's review is "limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Ruckleshaus*, 104 S.Ct. at 2880, f.n. 18.[23]

The government has given the Court an excellent summary of the historical background of the fractionated heirship problem. Brief for the Appellant 2-9. Appellees concede that a public purpose was envisioned by Congress in consolidating these fractionated interests and reducing the administrative costs of the government.[24] However, the result of the escheat provision is the conversion of individually held private property to public use for the greater good of the public. Thus, the taking here is for a public use.

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> experience. The benefits derived from these lands do not filter down to the vast majority of the Indian people on the Pine Ridge Indian Reservation. In this respect the system is not functioning as contemplated. Congress would be well-advised to examine closely the practical effect of legislation such as 25 U.S.C. § 2206. (J.S. 25a, f.n. 2.).

[23] The court of appeals did not even reach "the further question of whether the taking was for a public purpose" in light of its finding that there was a taking without compensation in violation of the Fifth Amendment. (J.S. 17a.)

[24] Appellees do not concede that these public purposes will be accomplished by the escheat provision of the ILCA nor did Judge Andrew Bogue of the United States District Court, District of South Dakota. See f.n. 22.

### D. The Escheat Provision Fails to Provide Just Compensation in Violation of the Fifth Amendment.

The original escheat provision of the ILCA provided that interests representing 2 per centum or less of a tract of land and earning less than $100 during the year prior to the decedent's death "shall" escheat to the tribe. (App. 1a) The statute on its face does not provide compensation for these escheating interests. Further, the legislative history makes it clear that there was no intention to pay just compensation. Brief for the Appellant 25 f.n. 16. Plainly, Congress was interested in incurring no further cost. This is so even though the federal government would derive direct benefit. Brief for the Appellant 5. The elimination of these fractionated interests will decrease the administrative costs of the government due to the fractionated heirship problem in the following ways: (1) decreasing the number of recordings required to maintain official land records; (2) decreasing the examinations of probate proceedings to determine current title status; and (3) decreasing the computation of large common fractions in determining ownership of these fractionated interests. S.Rep. 98-632, 98th Cong., 2d Sess. p. 3 (1984).

Appellees urge that it was Congress' allotment policy that caused the fractionated heirship problem. It is only fair that Congress, in its attempt to rectify this problem, compensate the real victims of its failed policy: the Indian people who hold small fractionated interests. The court of appeals correctly found that "by its plain terms . . . section 2206 does not provide for compensation to the

estate of the decedents for land it declares to escheat." (J.S. 17a.)

It is clear under the 1984 amendments to the escheat provision that individual Sioux now have the option of consolidating their fractionated interests in their family. It is now possible for an individual Sioux to devise an interest, otherwise escheatable, to any other owner of an undivided fractional interest in the tract of trust land. This would be in addition to the remedies suggested by the government under the original version: buying up other fractionated interests during his lifetime to increase his ownership percentage in the tract, partitionment and selling his fractionated interest during his lifetime to increase another's percentage in the tract. However, to the extent an individual does not want to consolidate his holdings in his family by devise, acquisition, partitionment or sale, the amended escheat provision still operates to extinguish his property interests without just compensation. The court of appeals recognized that this situation violates the Fifth Amendment because, again, it is "plain" by terms of the amended escheat provision that no compensation is to be paid to the decedents' estates.

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## CONCLUSION

The Court is urged to affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517, 25 U.S.C. 2201 *et seq.*, is reproduced in its entirety at J.S. App. 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at J.S. App. 32a-36a.

a. Section 207 of the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendant* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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*So in original. Probably should be "descend."

b. Section 207 of the Indian Land Consolidation Act, as amended by the Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, and as codified at 25 U.S.C. (Supp. II) 2206, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reserva-

tion or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decendent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatble interests.

3. Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allot-

ments shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patents to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven, entitled "an Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes." *Provided*, That the President of the United States may in any case, in his discretion, extend the period by a term not exceeding ten years; and if any lease or conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void: *Provided further*, That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered. Each of the patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

4. Section 28 of the Act of March 2, 1889, ch. 405, 25 Stat. 899, provides:

> That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in

manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act: and upon failure of such proof and proclamation this act becomes of no effect and null and void.

5. Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635, provides:

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article 6 of this treaty.

Supreme Court, U.S.
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No. 85-637

# In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, APPELLANT

*v.*

MARY IRVING, ET AL.

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY BRIEF FOR THE APPELLANT

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*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY BRIEF FOR THE APPELLANT

Appellees do not dispute—indeed, they specifically endorse (see Br. 2, 35)—the account in our opening brief (U.S. Br. 2-9) of the historical background and deleterious consequences of the fragmented ownership of allotted lands on the Nation's Indian reservations. Section 207 of the Indian Land Consolidation Act of 1983[1] and the 1984 amendments thereto[2] represent a carefully tailored response by Congress to the most extreme forms of the fractionated ownership problem.

Appellees do not appear to take issue with our basic submission (U.S. Br. 24-36) that, as applied to Indian tribes generally, Section 207 constitutes a valid exercise by Congress of its plenary power over the transfer, descent, and distribution of property held in trust for the benefit of Indians and does not result in an unconstitutional taking of property. Appellees do argue (Br. 12-24), however, that the Sioux, unlike all other Indians affected by the allotment policy, obtained from the United States an absolute contractual right to have their property descend to designated heirs, either by intestacy or devise. In appellees' view, the decedent owners of the fractional interests at issue in this case succeeded to the same absolute right, and

[1] Pub. L. No. 97-459, 96 Stat. 2519, 25 U.S.C. 2206.

[2] Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, 25 U.S.C. (Supp. II) 2206.

any action by Congress that adversely affects that right—even under vastly changed circumstances almost a century after the initial allotment—is unconstitutional.[3]

Appellees evidently take the position that Congress is powerless to take *any* steps to stem the ever-increasing fractionation of ownership of allotted lands, and thereby to maximize the benefit of those lands for the Indians, unless it exercises the power of eminent domain and purchases the fractional interests involved. Nothing in the special Sioux Allotment Act suggests that it was intended to place Congress in such a constitutional straightjacket. In these times of budgetary constraints, that interpretation could lead to still further fractionation of ownership for the indefinite future on the Pine Ridge, Rosebud and other Sioux Reservations. Before explaining why the Sioux Allotment Act cannot be read to require that anomalous result, we shall first place the Indian Land Consolidation Act in its proper historical perspective and correct appellees' mischaracterization of the effect of that Act.

1. The Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, which provided for the division of the Great Sioux Reservation into six reservations and for the allotment of those separate reservations to individual Indians, was a particular application of the allotment policy that commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589-590 & n.6 (1977); *Mattz* v. *Arnett*, 412 U.S. 481, 497 & n.19 (1973). It was anticipated when the General Allotment and Sioux Allotment Acts were passed that allotted parcels would pass out of trust status into fee ownership by the Indian allottee or his immediate heirs after the 25-year trust period specified in Section 5 and

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[3] Appellees do not challenge the court of appeals' holding (J.S. App. 4a-11a) that as potential heirs and devisees, they had no constitutionally protected right to *receive* the fractional interests involved and that Congress therefore was free, insofar as they are concerned, to change the laws of descent before any property passed. U.S. Br. 14-16, 26-27. Appellees therefore have abandoned their principal submission in the court of appeals. By contrast, appellees did not rely below on an asserted vested right of the *decedent* to pass property at death, which was the basis of the court of appeals' decision. Cf. J.S. App. 12a-13a n.11.

Section 11 of those Acts, respectively. 24 Stat. 389; 25 Stat. 891. It was further anticipated that any surplus unallotted lands owned by the tribes would be sold to the government and opened to non-Indian settlement (§ 5, 24 Stat. 389; § 12, 25 Stat. 892), and that Indian tribes and reservations would dissolve as individual Indians were assimilated into non-Indian society. See, *e.g.*, *Solem* v. *Bartlett*, 465 U.S. 463, 466-469 (1984).

Appellees are wrong in asserting (Br. 36) that "it was Congress' allotment policy that caused the fractionated heirship problem" and that Congress's efforts to address that problem through Section 207 of the Indian Land Consolidation Act should be held to constitute a taking for that reason. If the allotment policy had unfolded as planned, the Sioux reservations would no longer exist, most land that once was within the Great Sioux Reservation would no longer be in Indian ownership, and the fractionated heirship problem to which Congress responded in the Indian Land Consolidation Act of 1983 would never have arisen. But events did not unfold as planned. The trust periods for allotted lands were extended—at first temporarily,[4] and then permanently by Section 2 of the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 462. Correspondingly, most reservations were not disestablished, and tribes did not disappear. In fact, the revitalization of Indian tribes and their reservations were among the central purposes of the IRA. Those purposes were to be accomplished by, inter alia, prohibiting any further allotment of tribal lands (§ 1, 25 U.S.C. 461); restoring surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)); authorizing the acquisition of additional lands to be held in trust for the benefit of Indians (§ 5, 25 U.S.C. 465); and prohibiting the transfer or descent of Indian lands except to tribal members, their lineal descendants, and other Indians (§ 4, 25 U.S.C. 464).

The fractionated ownership of allotments thus is the result not of the allotment policy itself, but instead of subsequent actions taken by Congress to undo the deleterious consequences of

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[4] See, *e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 325; *Oglala Sioux Tribe* v. *Hallett*, 708 F.2d 326, 330 (8th Cir. 1983); 5 Kappler, *Indian Affairs, Laws & Treaties* 642, 667, 680-681 (1941).

that policy, by, inter alia, retaining allotments in trust status for the benefit of succeeding generations of Indians. Section 207 of the Indian Land Consolidation Act was intended to address this inevitable by-product of Congress's repudiation of the allotment policy; and like that repudiation, Section 207 was enacted for the benefit of the Indians. Section 207 therefore is not the sort of statutory provision that suggests a requirement that compensation must be made *to* the Indians in order for it to be given effect.

b. Absent legislation such as Section 207, ownership of allotments inevitably would become more fragmented with each passing generation. The consequence would be to exacerbate the various problems created by fractionated ownership: a complex mix of interests in allotted tracts, the inability to put land to its most economic use, quasi-abandonment of some tracts, devaluation of individual interests, an absence of a personal nexus to and responsibility for the land, and the substantial burden borne by the Bureau of Indian Affairs (BIA) in administering allotments in such a condition. See U.S. Br. 5-9. These consequences adversely affect not only the owners of a particular tract, but also the entire reservation community. Land is central to the history, culture and economic well-being of most Indian tribes, and Congress accordingly has sought in the IRA and subsequent legislation to strengthen the reservation system and to foster economic development and self-determination for Indians within that framework. The increasingly fragmented ownership of individual tracts of allotted lands undermines those endeavors because of its enervating effect on the economic, cultural, and spiritual life of the reservation. These considerations, none of which are denied by appellees, impelled Congress in 1983 to intervene and arrest the most extreme forms of fragmented ownership. Compare *Texaco, Inc.* v. *Short*, 454 U.S. 516, 529-530 & n. 23 (1982); *United States* v. *Locke* No. 83-1394 (Apr. 1, 1985), slip op. 2, 21. This good faith undertaking by Congress should not lightly be overturned.[5]

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[5] Appellees "concede that a public purpose was envisioned by Congress in consolidating these fractionated interests and reducing the administrative costs of the government" (Br. 35), and they apparently also concede the legitimacy

2.a. Appellees' submission also rests on an erroneous conception of Section 207 of the Indian Land Consolidation Act. Contrary to the impression created by appellees' brief, Section 207 does not unilaterally and immediately appropriate all Indian allotments to the ownership and use of the government. Of course, in the narrow circumstances in which it operates, Section 207 does transfer the ownership of an interest in an allotment from its owner to another party (the Indian tribe concerned); and we may assume that the transfer of ownership by operation of law typically would constitute a taking of property within the meaning of the Fifth Amendment. See Appellees' Br. 31-33. But the critical distinguishing fact in this case, which appellees ignore, is that the escheat to the tribe under Section 207 occurs at a time when *some* transfer of ownership must occur in any event, by virtue of the death of the prior owner.

Significantly, moreover, such dispositions at death have always been subject to the [redacted] power of the legislature to regulate the descent and distribution of property by intestacy or devise, including the power to designate the heirs to whom property will descend. See U.S. Br. 24-28. In any given case, such a law might direct the disposition of property to persons other than those whom the decedent might have chosen. But that consequence of governmental regulation in this area has never been though to constitute a "taking" of the property involved. Appellees' contrary argument—that the operation of Section 207 must be viewed not as a regulatory measure but as

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of those objectives (see Br. 28, 33). See also Sisseton-Wahpeton Amicus Br. 3-4, 9-10. Appellees do question whether they personally will benefit from the "reciprocity of advantage" discussed in our opening brief. See U.S. Br. 18-19, citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 139-140 (1978) (Rehnquist, J., dissenting). But appellees properly acknowledge that the Court's review in this regard is " 'limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.' " Br. 35, quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1015 n.18 (1984). Here, Congress rationally could determine that, especially over time, individuals who have interests subject to escheat will realize some reciprocity of advantage from the escheat of interests owned by others.

the constitutional equivalent of a physical seizure of property that automatically gives rise to a taking claim (see Br. 29-32)—would effectively eliminate the authority of Congress and the state legislatures to regulate the disposition of property at death. Compare *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457, 467 (1831) ("It is argued, that [statutes of] limitation * * * indirectly * * * effect a complete divesture [*sic*] and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of [the] law.").

b. Appellees also fail to appreciate the carefully circumscribed and flexible nature of the regulatory approach embodied in Section 207 and the alternatives to escheat by which an owner can assure that his interest will remain in individual ownership. As an initial matter, Section 207 applies only to what Congress reasonably determined were de minimis interests in allotments—those interests that represent 2% or less of the allotment and are capable of earning less than $100 annually. In addition, the Act does not interfere with the benefits of ownership during the owner's lifetime, including his right to share in the income from the allotment or to convey his interest by sale or gift. If the owner does sell his interest, the *proceeds* of course may descend by intestacy or devise. In that event, Section 207 would have had the effect only of preventing the descent of the fractional interest *in kind*. See U.S. Br. 9-10, 34-35. Such a transformation of an interest in real property into its equivalent in money is not an unconstitutional taking of property. Nor does a covered de minimis interest automatically escheat to the tribe even if the owner has not disposed of it by the time of his death. The owner may avoid that result by partitionment or by acquiring additional interests in the same allotment during his lifetime. And under the amended version of Section 207, the owner may devise his interest to another owner of an interest in the same allotment. 25 U.S.C. (Supp. II) 2206(b); U.S. Br. 34-35.[6]

[6] In an effort to permit still further flexibility, and in deference to tribal self-government, the 1984 amendments also authorize Indian tribes to adopt ordinances that provide for alternative dispositions of covered interests in a way that will avoid further fragmentation (25 U.S.C. (Supp. II) 2206(c))—*e.g.*, by providing for such an interest to descend by intestacy to another owner of an interest in the same tract even if the owner has not left a will that so stipulates.

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Thus, far from inflexibly mandating the transfer of all covered interests to the government, as appellees imply, Section 207 creates an incentive for an owner of a de minimis interest to arrange his own affairs so as to ensure the retention of that interest in individual ownership after his death, but to do so in a way that furthers the important public purpose of preventing further fragmentation of ownership. Compare *United States* v. *Locke*, slip op. 21.[7] The "escheat" feature of Section 207 simply has the effect of designating the tribe concerned as the statutory heir of the interest if the owner declines to make any other arrangements. That designation constitutes "nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal[,] within its dominion may be trans-

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[7] In many instances the owner of a relatively insubstantial interest in an allotment might be content to have that interest pass to the tribe rather than to be further subdivided among his heirs or devisees, at least if he understood that similar interests in other allotments on the reservation would likewise escheat and thereby occasion a reciprocity of advantage. Even in this case, there is no firm indication that any of appellees' decedents objected (or would have objected) to the operation of Section 207. Appellees assert (Br. 3) that decedent Cross "did in fact attempt to preserve for her five minors her trust property interests" by executing a will one week before her death. That will, however, refers to Cross's "worldly goods" and specifically mentions only her house in Nebraska; it does not mention her interests in allotments on the Pine Ridge and Rosebud Reservations in South Dakota. See Complaint, Exh. D.

In an apparent effort to marshal equitable considerations against Section 207, appellees discuss (Br. 3-5) the 15 fractional interests in allotments on the Pine Ridge Reservation that were owned by decedent Cross and escheated to the Oglala Sioux Tribe pursuant to Section 207. However, appellees' examples serve only to illustrate the compelling need to arrest the fragmentation of ownership. Absent escheat, those 15 interests—6 of which had no appraised value and generated no income (J.A. 24-25)—would have been subdivided among Cross's five minor children. As a result, each child would have had less than a 0.4% interest in the allotments concerned; the annual income to each child from the nine subdivided interests that have any value would have ranged between $0.18 and $10.22; and the appraised value of those interests would have ranged between $14.22 and $56.67 (J.A. 22-24). By any measure, these are insubstantial interests in real property. Yet under appellees' submission, Congress was constitutionally barred from preventing this division of Cross's interests, and indeed will be compelled to permit still further fragmentation when her children die.

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mitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 492-493 (1850); U.S. Br. 25-28. Such a regulatory measure does not constitute a "taking" of property within the meaning of the Fifth Amendment. See *United States* v. *Locke*, slip op. 23 ("Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.").[8]

c. The foregoing discussion sufficiently answers appellees' assertion (Br. 19, 25) that Section 207 converts the decedent's interest from a fee interest to a life estate. A life estate is a possessory interest of fixed duration, measured by the lives of one or more persons. L. Simes & A. Smith, *The Law of Future Interests* 50 (2d ed. 1956). By contrast, a fee interest is of potentially infinite duration. *Id.* at 47. Section 207 does not limit the duration of a fractional interest to the life of its owner. As we have explained, the owner may convey his fee interest during his lifetime, in which event the fee will pass unimpaired and survive the death of the prior owner. And under the amended version, the owner of a covered fractional interest may devise it to another owner of an interest in the same tract. Accordingly, this case bears no relation to the dictum in *Choate* v. *Trapp*, 224 U.S. 665, 674 (1912), upon which appellees rely (Br. 25), that a statute "which reduced [the allottee's] fee to a life estate" would be invalid.

Appellees also err in contending (Br. 29-30) that Section 207's focus on a narrow category of de minimis interests is irrelevant because the magnitude of the property interest is not dispositive in determining whether a "taking" has occurred. Appellees rely on *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-437 (1982). But as the Court stressed (*id.* at 434-435,

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[8] Viewed another way, if the owner does not take steps to avoid escheat, it may be presumed that he has effectively abandoned his interest or is prepared to have it so treated when he dies. Compare *United States* v. *Locke*, slip op. 13-15, 18-19; *Texaco, Inc.* v. *Short*, 454 U.S. 516, 526-528 (1982); *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466-468 (1831).

436-437), *Loretto* involved an actual physical invasion. By contrast, where, as here, the challenged governmental action is regulatory in nature, the Court has made clear that one of the important factors to be considered is the "economic impact of the regulation." See, *e.g.*, *Connolly* v. *Pension Benefit Guaranty Corp. (PBGC)*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). The insubstantial nature of the affected property interests therefore is clearly relevant to the taking inquiry in this case.[9]

For similar reasons, and contrary to appellees' contention (Br. 31-32), it is relevant as well that an interest affected by Section 207 passes to the tribe rather than to the United States. As we have explained (U.S. Br. 31-32), this "character of the governmental action" (*Connolly* v. *PBGC*, slip op. 13) confirms that the role of Section 207 is to adjust benefits and burdens in order to promote the general welfare of the reservation community, not to accomplish a direct invasion of the property, either by the Federal Government itself (see *Penn Central*, 438 U.S. at 124) or by non-Indians who would completely deprive the Indians of their beneficial interest (compare *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 414-417 (1980)). This feature of Section 207 therefore ensures that it substantially furthers the United States' trust responsibility to the Indians. Compare *Sioux Nation*, 448 U.S. at 407-409, 414-417.

3. Appellees argue, however, that although Section 207 of the Indian Land Consolidation Act may be valid as a general matter, it is unconstitutional as applied to allotments on the reservations that were carved out of the Great Sioux Reservation by the Act of March 2, 1889. Appellees read the 1889 Act as a "bargain" that confers on the original Sioux allottees and every succeeding generation of their descendants a perpetual

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[9] For this reason, there is no merit to appellees' contention (Br. 34) that if Section 207 is not held to effect a taking, "then there is no safeguard to prevent Congress from increasing the percentage of the interest in the tract from 2% to 5% to even 100%." The very nature of the "ad hoc, factual inquiry" mandated by this Court (see *Connolly* v. *PBGC*, slip op. 13) would require a different balancing if the interests involved were more substantial and the ownership of the tract were correspondingly less fragmented.

and absolute contractual right to pass their property at death to whomever they choose, free even from the sort of reasonable regulation prescribed by Section 207 of the Indian Land Consolidation Act. See Br. 12-29, 37. Like the court of appeals (J.S. App. 7a-8a, 16a), appellees apparently rely (see Br. 12, 21-22) on the language in Section 11 of the Sioux Allotment Act that provides, upon the death of the original allottee, for the land to be held in trust for the allottee's "heirs" under state law (25 Stat. 891). There are numerous flaws in appellees' contention that the quoted term was intended to confer a permanent contractual right to be free of what appellees concede (Br. 9) to be "Congress' usual authority to regulate the descent and distribution of Indian property."

a. This Court has held that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a 'law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 466 (1985), quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). See also *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 10-11. That presumption may be overcome only if Congress's intent to confer vested or contractual rights is "clearly and unequivocally expressed" (*National Railroad Passenger Corp.*, 470 U.S. at 466).

The Sioux Allotment Act contains no "clearly and unequivocally expressed" intent on the part of Congress to contract away its plenary authority to enact laws regulating the transfer, descent, and distribution of property held by the United States in trust for the Indians. Such a notion in fact is refuted by the text of Section 11 of that Act, which is virtually identical to Section 5 of the General Allotment Act. Section 11 provides: (i) that upon the death of the allottee, the property will be held in trust for "his heirs according to the laws of the State or Territory where such land is located," and (ii) that "the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto."

Because the state law specified by Congress is subject to amendment by the state legislature at any time, the incorporation of state law into Section 11 of the Sioux Allotment Act obviously cannot be read to confer on Sioux allottees a contractual immunity from changes in the law of descent. See U.S. Br. 39 n.22. And because state law does not apply of its own force to lands held in trust for Indians, but instead applies only to the extent it has been incorporated in an Act of Congress that is itself subject to amendment at any time.[10] the incorporation of state law in Section 11 likewise cannot be read to have contracted away *Congress's* plenary authority to enact legislation that directly regulates the descent of Indian property and thereby supersedes the rules of descent prescribed by state law.[11] Section 207 of the Indian Land Consolidation Act is just such legislation. The language of Section 11 therefore makes it particularly clear that it does *not* confer contractual or vested rights on allottees of the Pine Ridge and Rosebud Reservations, but instead "merely declares a policy [regarding the descent of Indian allotments] to be pursued until the legislature shall ordain otherwise" (*National Railroad Passenger Corp.*, 470 U.S. at 466).

b. Appellees nevertheless assert (Br. 17-18, 21-23) that the term "heirs" in Section 11 and the supposed "bargain" embodied in the 1889 Act as a whole conferred on the Sioux allottees an absolute right not only to have their interests in allotments pass

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[10] See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 556, 561 (1983) (discussing the disclaimer clause in Section 4 of the Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, by which South Dakota was admitted to the Union); *South Carolina* v. *Catawba Indian Tribe of South Carolina*, No. 84-782 (June 2, 1986), slip op. 9-11; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240-241 n.13 (1985).

[11] Congress has enacted numerous such statutes. See, *e.g.*, Act of Feb. 28, 1891, ch. 383, § 5, 26 Stat. 795, 25 U.S.C. 371 (providing that children born of the cohabitation of a man and woman according to Indian custom shall be regarded as legitimate); Act of June 25, 1910, ch. 431, § 2, 36 Stat. 856, 25 U.S.C. 373 (permitting disposal of allotments by will); IRA of 1934, § 4, 25 U.S.C. 464 (limiting persons to whom restricted property may be transferred or descend); Act of Nov. 24, 1942, ch. 640, § 1, 56 Stat. 1021, 25 U.S.C. 373a (escheat to tribe of restricted estate if Indian dies intestate without heirs). See also U.S. Br. 7-8 n.8 (listing statutes that limit descent of property on particular reservations).

to their children or other family members by intestate succession, but also to dispose of such interests by will. There is no support for that proposition. The reference to "heirs" in Section 11, like that in Section 5 of the General Allotment Act, was intended to subject the descent of allotments only to the state law of intestate succession. See F. Cohen, *Handbook of Federal Indian Law* 230-231 (1942)). Moreover, Section 11, like Section 5 of the General Allotment Act, broadly provides that any "conveyance" of allotted lands prior to the expiration of the trust period "shall be absolutely null and void" (25 Stat. 891). That prohibition applies to the disposition of an allotment by will. See *Blundell* v. *Wallace*, 267 U.S. 373, 375 (1925); *LaMotte* v. *United States*, 254 U.S. 570, 579 (1921); *Taylor* v. *Parker*, 235 U.S. 42, 43-44 (1914); *In re House's Heirs*, 112 N.W. 27, 28-29, 132 Wis. 212, 215 (1907); *United States ex rel. Zane* v. *Zane*, 69 S.W. 842, 845 (Indian Terr. 1902); cf. *Hayes* v. *Barringer*, 168 F. 221 (8th Cir. 1909). It was not until the Act of June 25, 1910 (ch. 431, § 2, 36 Stat. 856, 25 U.S.C. 373) that Congress lifted that prohibition and conferred on Indians the power to dispose of a trust or restricted allotment by will. *Blanset* v. *Cardin*, 256 U.S. 319, 323-327 (1921); *Tooahnippah* v. *Hickel*, 397 U.S. 598, 613 (1970) (Harlan, J., concurring). Thus, to the extent that appellees' assertion of an absolute contractual right to pass property at death rests on the notion that Section 11 conferred on the Sioux allottees and their descendants the right to dispose of allotments by will, their submission is especially unmeritorious.[12]

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[12] Appellees contend (Br. 18 & n.11, 22-23) that the Sioux were assured when the 1888 version of the Sioux Allotment Act was explained to them by the Commission sent to the Sioux (see page 14, *infra*) that they could dispose of property by will. But in support of that proposition, appellees cite only a single passage from the Commission's proceedings: a portion of a statement by Rev. Cleveland, one of the Commissioners. See Appellees' Br. 18 n.11, quoting S. Doc. 17, 50th Cong., 2d Sess. 139 (1888). Appellees' selection of the two sentences upon which they rely is misleading. The preceding three sentences, not quoted by appellees, in fact make clear that Rev. Cleveland stated only that the allottee could specify how his property would be divided among his children *after* he was issued a patent in fee. Rev. Cleveland made clear that prior to that time, while the property remained in trust status, the property would descend to the allottee's heirs "according to law" (*ibid.*). – *i.e.*, according to the law of intestate succession.

c. Appellees' construction of Section 11 is still further undermined by this Court's decision in *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918). In *Fink*, an allotment had been issued pursuant to a 1902 statute affecting the Creek Indians that provided for the descent of Creek allotments to be governed by Arkansas law. The Court explained that this descent provision was consistent with the general "policy of Congress," which was established by the specifications in Section 5 of the General Allotment Act that property would be held in trust for a deceased allottee's "heirs according to the laws of the State" and that "the law of descent and partition in force in the State" shall apply to the allotment. 247 U.S. at 290, 294. In 1908, Congress amended the 1902 Creek statute to provide that allotments thereafter would descend according to the laws of the newly admitted State of Oklahoma. In *Fink*, the Court rejected the claim that the 1902 Act had created a vested or contractual right to have allotted land descend to specified persons in accordance with Arkansas law (247 U.S. at 294):

> What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner.

It follows a fortiori from *Fink* that appellees' essentially identical contractual claim must be rejected. The Creek statute at issue in *Fink* actually incorporated an agreement that already had been concluded with the Creeks (see Act of June 30, 1902, ch. 1323, 32 Stat. 500 *et seq.*), and yet the Court still held that no contractual rights were conferred by the heirship provisions of the Act. The Sioux Allotment Act, by contrast, neither enacts a previously concluded agreement with the Indians nor takes the form of a negotiated agreement. See pages 14-16, *infra*. Moreover, unlike the descent provisions of the Creek statute, Section 11 of the Sioux Allotment Act incorporates verbatim the language of Section 5 of the General Allotment Act, upon which the Court relied in *Fink*. Section 11 therefore must also be read merely to state the "policy of Congress" (247 U.S. at 290, 294), not to confer contractual rights.

d. Appellees fare no better in their attempt (Br. 13-17, 22) to draw from the background of the Sioux Allotment Act an implied contractual immunity to the operation of Section 207 of the Indian Land Consolidation Act of 1983. Although Section 28 of the Sioux Allotment Act (25 Stat. 899) provided that it would take effect only with the consent of three-fourths of the adult male Sioux Indians,[13] the language of the Act in general and of Section 11 in particular was not the product of detailed negotiations between the United States and the Sioux that could form the basis for the sort of contractual claim appellees advance. Congress instead unilaterally drew the relevant language of Section 11 directly from Section 5 of the General Allotment Act, which was *not* made contingent upon the consent of the affected tribes and therefore cannot be characterized as a "bargain" that includes a contractual immunity to regulation. Sisseton-Wahpeton Amicus Br. 2, 8-9; cf. R. Strickland, *et al.*, *Felix Cohen's Handbook of Federal Indian Law* 131 (1982). These origins of Section 11 weigh heavily against the implication of a permanent immunity to governmental regulation of the descent of restricted allotments.

The other circumstances surrounding the enactment of the Sioux Allotment Act likewise cut against any such implication. That Act was not Congress's first attempt to secure the Sioux's consent to the division and allotment of the Great Sioux Reservation. Congress had enacted a similar statute a year earlier (Act of Apr. 30, 1888, ch. 206, 25 Stat. 94 *et seq.*), but the Sioux had failed to give the requisite three-fourths consent after the 1888 Act was presented to the Indians at each of the agencies on the Reservation by a specially appointed Commission. S. Doc. 17, 50th Cong., 2d Sess. 19 (1888). The Commission's report states that the Sioux's principal objections to the 1888 Act included that "they had not been consulted when the Act was framed" and that the Commissioners "had not come to bargain with them, but were to present for their acceptance or rejection an act of Congress which already had received the approval of the President" (*id.* at 4). Because the relevant provisions of Section

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[13] This consent requirement was included to comply with Article XII of the Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 639. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 589 & n. 5.

11 of the 1888 Act (25 Stat. 98) were identical to those in Section 11 of the 1889 Act (25 Stat. 891), these statements in the Commission's report reinforce the conclusion that Section 11 does not embody a bargained-for immunity to the reasonable governmental regulation prescribed by Section 207 of the Indian Land Consolidation Act.

Moreover, although the Commission's 1888 report recites the Indians' opposition to other provisions of the 1888 Act (especially to the size of the allotments for heads of household and the price to be paid for surplus lands (S. Doc. 17, *supra*, at 4, 7)), there is no mention in the Commission's report of any objection to Section 11 (see *id.* at 2-30). Similarly, although Congress framed the 1889 Act to meet the Indians' objections to the 1888 Act (see U.S. Br. 41-42), it made no changes in the operative language of Section 11 (see U.S. Br. 42 & n.25). These circumstances obviously furnish no support for appellees' contention that Congress conferred on the Sioux allottees and every generation of their descendants a unique and permanent contractual immunity from legislation such as Section 207. Far less do these circumstances constitute the clear and unequivocal expression of congressional intent that would be necessary to overcome the presumption that a statutory provision such as Section 11 of the Sioux Allotment Act is not intended to create contractual rights.

Nor do the few statements by members of the two Commissions to the Sioux that appellees have excerpted from the hundreds of pages of the Commissions' proceedings (see Br. 16-17, 22) overcome that presumption. The Commissioners stressed to the Sioux that they had no authority to bargain with the Sioux on behalf of Congress, but could only present the 1888 and 1889 Acts to be accepted or rejected by the Sioux. See page 14, *supra*; U.S. Br. 42-43. In any event, the Commissioners had no authority to contract away Congress's power to regulate the descent and distribution or restricted Indian property, and they did not purport to do so.

As the court of appeals observed, the "references to heirs and children in conjunction with land," upon which appellees rely, were "relatively sparse" (J.S. App. 12a n.10). Significantly, moreover, the references appellees quote (Br. 16-17, 21) all respond to the Indians' concern that their lands might be taken

from them by non-Indians (S. Doc. 17, *supra*, at 108, 145; S. Doc. 50, 51st Cong., 1st Sess. 54, 85, 111 (1889))—a possibility with which the Sioux were painfully familiar by virtue of their recent loss of the Black Hills in 1877. See *United States* v. *Sioux Nation*, 448 U.S. at 376-384. The quoted passages simply reflect the premise of the Sioux Allotment Act that acceptance of land in severalty would furnish the Sioux with essential protection against the loss of all of their land to non-Indians. Section 207 of the Indian Land Consolidation Act is fully consistent with those assurances, because it does not cause land to pass out of Indian ownership. It instead addresses the distinct problems created among the Indians themselves as a result of the extreme fragmentation of ownership of allotments that remain in Indian hands. The passages cited by appellees have no bearing on that problem, or on Congress's chosen remedy of providing for the restoration of de minimis interests to the tribe itself when the individual Indian owner has declined to make appropriate alternative arrangements. Accordingly, nothing in the Commissions' explanations of the Sioux Allotment Act undermines the validity of Section 207 as applied to the Pine Ridge and Rosebud Reservations—even if the language of Section 11 were thought to be sufficiently ambiguous to justify some reliance on those explanations. Compare *South Carolina* v. *Catawba Indian Tribe*, slip op. 12; *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. 19.

It is significant as well that when the Commissions presented the Act to the Sioux, it was anticipated that the allotments would pass into fee status at the expiration of the 25-year trust period. Congress, the Commissions, and the Sioux therefore would have had no occasion to consider the possible need for legislation almost 100 years later to address problems created by the repudiation of the very allotment policy on which the Sioux Allotment Act was premised. Thus, even if there was some contractual element to Section 11 within the context of its original enactment, Congress is not foreclosed from enacting legislation in the drastically changed and unanticipated consequences that now obtain, long after the original 25-year trust period has expired. Cf. Restatement (Second) of the Law of Contracts § 261 (1979). By contrast, in *Choate* v. *Trapp*, 224 U.S. 665 (1912),

upon which appellees principally rely (Br. 20-21, 23-28), Congress sought to repeal an express tax exemption during the original 25-year trust period for which it was guaranteed.

Appellees' reliance (Br. 22, 24) on the principle that ambiguities should be resolved in favor of the Indians and as the Indians would have understood them is equally misplaced. There is no ambiguity in Section 11, especially not one that would overcome the strong presumption against reading a statute to create contractual rights to be free of governmental regulation; nor is there reason to believe that the Sioux understood otherwise. These rules of construction are of little relevance here in any event, because Section 207 itself was enacted for the benefit of the Indians, and it operates to transfer affected property interests to the tribe, not to non-Indians. Compare *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).[14]

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[14] Appellees observe in the statement portion of their brief that Section 207 did not provide any grace period, which appellees contend would have permitted the decedent owners of the fractional interests at issue in this case to arrange their affairs in a manner that would avoid escheat of their interests (*e.g.*, by selling or giving away their interests, applying for partition, or acquiring additional interests). See Br. 3, 6, citing *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982). To the extent that appellees intend by their citation to *Short* to raise a due process objection to the application of Section 207 to the interests in allotments involved in this case, we note that appellees raised no such claim in the district court or court of appeals or in their Motion to Affirm in this Court. Nor do appellees urge in the argument portion of their brief that the judgment below should be affirmed on due process grounds. Accordingly, there is no due process issue properly before this Court.

In any event, appellees do not contend that the Secretary was required to furnish personal notice of the enactment of Section 207 to every owner of a fractional interest in an allotment (cf. *Watkins* v. *Parker*, No. 83-1660 (June 4, 1985)), although the Secretary's implementing instructions did urge all Area Directors and Reservation Superintendents "to provide all Indian landowners under their jurisdiction with notice of its effects" (J.S. App. 39a). Moreover, because Section 207 represents an exercise by Congress of the established power of the sovereign to regulate and direct a particular disposition of property at death, and because the descent of property typically is governed by the law in effect at the time of death, no grace period was constitutionally required. And even if the decedents might have insisted upon some grace period following the enactment of Section 207, it is by no means clear that appellees would have a valid claim. As we have explained (see note 7, *supra*), some

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
*Solicitor General*

SEPTEMBER 1986

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(perhaps many) decedents presumably would have accepted the consequence that their de minimis interests would escheat to the tribe and would have declined to make alternative arrangements for that reason. The heirs and devisees of such an owner have no standing to challenge his declination. In addition, in this case, appellees' decedents died between March 18 and June 23, 1983, between two and five months after Section 207 was signed into law on January 12, 1983. There is no indication that it would have been impracticable for the decedents to dispose of their interests by gift or sale or to purchase other interests—or at least to take steps to those ends—during the period preceding their death. Decedent Cross, for example, executed a will disposing of her property to her minor children on March 16, 1983, one week before her death. See note 8, *supra*.

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No. 85-637

IN THE

# Supreme Court of the United States

October Term, 1985

DONALD P. HODEL, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS AND SUCCESSORS IN OFFICE,

*Appellant,*

v.

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISCONETTE AS GUARDIAN FOR DUANE CROSS, ANTHONY CROSS, FAITH CROSS AND ALL OTHERS SIMILARLY SITUATED,

*Appellees.*

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE YAKIMA INDIAN NATION, and BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

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*Appellees.*

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellees has been orally received per telephone call November 26, 1985. The consent of the attorney assigned to the case by the Solicitor General was

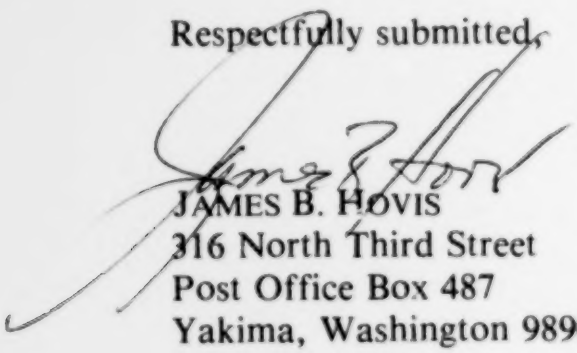
likewise requested per telephone call this date but while that request was not refused, said attorney advised that this request should be addressed to the Solicitor General in writing. This was done on said November 26, 1985, and the results of this written request will be furnished under separate cover as soon as it is received.

The interest of the Yakima Indian Nation is the protection of its members' interests from the provisions of 25 U.S.C. Section 2206 (1982) and the Act of October 30, 1984, Pub. L. 98-608 (H.J.R. 158), 98 Stat. 3171, 3173, which provide that small shares of land allotted in trust to individual members of the Yakima Indian Nation may not pass by intestacy or devise but instead escheat to the Yakima Indian Nation. This position was taken by a General Council of the Yakima Indian Nation, at which all adult members may attend and vote, by a vote of 268 for this position and a vote of 2 against this position. This interest is the same as the appellees and the Oglala Sioux Tribe, who filed a brief amicus in the Court of Appeals for the Eighth Circuit. They, like the Yakima Indian Nation, do not want the interests taken from its members without compensation, even though the interests would go to the benefit of the tribe. Right is right, and the Yakima Indian Nation would like to add its voice in support of the determination by said Eighth Circuit Court of Appeals. Further, the Yakima Indian Nation wishes to raise the question of congressional breach of fiduciary responsibility as a basis for the unconstitutional determination of said Court. Appellees have based their arguments more on the issue of the taking of vested interests.

Undersigned counsel for your petitioning amicus has practiced before this honorable Court both on plenary and

summary matters and it is believed by the Yakima Indian Nation that an amicus brief can add to the determination of this important matter without delaying or hampering this Court's decision.

Respectfully submitted,



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No. 85-637

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MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISCONETTE AS GUARDIAN FOR DUANE CROSS, ANTHONY CROSS, FAITH CROSS AND ALL OTHERS SIMILARLY SITUATED,

*Appellees.*

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

# BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

## I.

## INTEREST OF AMICUS CURIAE

The Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, is an Indian tribe located in the south central part of

the State of Washington. The Yakima Indian Nation's status as a sovereign entity was reserved in the June 9, 1855 *Treaty with the Yakimas* (12 Stat. 951), which was ratified on March 8, 1859 and proclaimed on April 18, 1859. From lands ceded to the United States, exceeding ten million acres, the *Treaty with the Yakimas* also reserved the Yakima Indian Reservation with a total area of 1,367,105 acres. Of this reservation total, the Yakima Indian Nation owns 842,978 acres. Individual Indians are allotted 274,988 acres and the remaining 249,416 acres are held in non-trust or non-restricted title by others — mostly non-Indians.

Since 1955, under the Act of July 28, 1955, 69 Stat. 392, as amended by the Act of August 31, 1964, 78 Stat. 748 (25 U.S.C. Secs. 608-608c), the Yakima Indian Nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise. Under the Act of August 9, 1946, 60 Stat. 968, and an amendment of Section 7 of that Act by the Act of December 31, 1970, 84 Stat. 1874 (25 U.S.C. 607), the Yakima Indian Nation has acquired, and is now purchasing, the interests of members and non-members not possessing the necessary one-fourth blood quantum of the antecedent tribes and bands. This action provides for the consolidation of fractionated interests, fosters fair enrollment practices and provides fair compensation for tribally-acquired interests.

The Yakima Indian Nation's land consolidation and enrollment practices have promoted land consolidation, thereby reducing federal expenditures regarding administration of fractionated interests in Yakima Reservation allotments. As the Government has noted, reduction of federal expenditures is a primary purpose of Section 207 of the Land Consolidation Act, 25 U.S.C. 2206, and Section 207 of the Act of October 30, 1984, Pub. L. 98-608, 98 Stat. 3173, (25 U.S.C. 483a). Jurisdictional Statement pp. 7, 22 n.5.

The Yakima Indian Nation's land consolidation plan and the foregoing federal laws, which are the foundation of this plan, foster consolidation and further provide that the heirs receive compensation for tribally-acquired interests. The provisions now before this Court, 25 U.S.C. 2206, save the United States monies involved in administering fractionated interests; but these provisions do so arbitrarily and in violation of the United States' fiduciary responsibility, thus unconstitutionally placing the entire financial burden of this federal saving on individual Indians. It is this effect of 25 U.S.C. Section 2206 on the members of the Yakima Indian Nation and other Indians that the Yakima Indian Nation opposes and is the reason that Appellees' Motion to Affirm is supported by this brief.

## II.

## ARGUMENT

The holding of the Court of Appeals for the Eighth Circuit is correct. Reasoning that supports the Court of Appeals' determination that there exist vested rights entitled to protection of the Fifth Amendment is covered in that opinion and in the Motion to Affirm. Transcending said determination, the holding of the Court of Appeals should be sustained regardless of the existence or non-existence of vested property interests.

Inherent in the Court of Appeals holding 25 U.S.C. 2206 unconstitutional is this Court's requirement that the constitutional legislative power of Congress — regarding Indian property — must be tied rationally to the trust obligations of the United States. The unilateral placing of the cost burden of consolidation on these Indian wards for the financial benefits of consolidation flowing to the trustee is

contrary to this fiduciary relationship and is violative of this constitutional limitation on Congress. Legalisms abound in the decisions below and in the Jurisdictional Statement; but underlying the section under attack is the bottom line that Congress abused the trust responsibility to Indians that is the basis of its legislative power over alienation of the trust properties involved.

This guardian-ward relationship was first noted by this Court in *Cherokee* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831). This Court has continued to construe statutes under this indisputable existence of a general trust relationship between the United States and the Indian people. *United States* v. *Mitchell,* 463 U.S. 206, 225 (1983).

Indeed it is this guardianship theory that this Court distinctly relied upon as the basis for congressional power over Indians. *United States* v. *Kagama,* 118 U.S. 375 (1886). While this Court has not cited trust responsibility as the sole source of congressional power since *United States* v. *Candelaria,* 271 U.S. 432 (1926), this Court has made it clear that the constitutional standard for judicial review of Indian legislation is whether the legislation under attack serves this fiduciary responsibility. *Delaware Tribal Business Community* v. *Weeks,* 430 U.S. 73, 83-85 (1977).

In *Delaware Tribal Business Community* v. *Weeks, supra,* this court rejected arguments seeking to establish that the power of Congress is so pervasive as to render its legislation not subject to judicial constitutional review. Instead, this Court held that the constitutional standard for judicial review was whether the legislation under attack was "tied rationally to the fulfillment of Congress' unique obligations toward Indians". 430 U.S. at 85. Where Congress is exercising its authority over Indians rather than some other distinctive power, this trust obligation requires that its statutes be based on a determination that the Ind-

ians will be protected. Otherwise, such statutes are not rationally related to the trustee obligation. *United States* v. *Sioux Nation,* 448 U.S. 471 (1980).

Under the admitted facts of the attacked escheat section enactment, Congress did not make good faith efforts to protect its Indian wards and see that they receive full value. This is the approved test of this Court in *United States* v. *Sioux Nation, supra.* It is clear that Congress was more interested in reducing administrative obligations of the United States than in protecting its wards. In other words, Congress was looking out for the interests of the United States, not those of its wards. Requiring that compensation be given for the interests flowing to the tribes would have been very easy for Congress to do. Congress has so provided in the legislation regarding interests flowing to the Yakima Nation under land consolidation legislation pertaining to the Yakima Reservation. 25 U.S.C. Sec. 607. The Government describes the interests that are lost as de minimus. If they are so de minimus, tribes could readily provide funds for adequate compensation. Further, there was no showing that Congress could not, in its own as well as its wards' interests, provide funds for acquisition to reduce administrative costs that was so clearly the primary goal of Congress. In the enactment of 25 U.S.C. 2206, Congress was fostering the interests of the United States, not its Indian wards; therefore, the statute is unconstitutional.

## III.

## CONCLUSION

Appellees' Motion to Affirm should be granted.

Respectfully submitted,

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*Dated: December 5, 1985*

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No. 85-637

IN THE

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DONALD P. HODEL, Secretary of the Interior,

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*v.*

MARY IRVING, *et al.*,

*Respondents.*

---

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF THE SISSETON-WAHPETON SIOUX TRIBE

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IN THE

# Supreme Court of the United States

**October Term, 1985**

**No. 85-637**

DONALD P. HODEL, Secretary of the Interior,

*Appellant,*

*v.*

MARY IRVING, *et al.*,

*Respondents.*

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF THE SISSETON-WAHPETON SIOUX TRIBE

### Interest of *Amicus Curiae*

The Sisseton-Wahpeton Sioux Tribe is a federally recognized Indian tribe with a governing body recognized by the Secretary of the Interior. The Tribe occupies the Lake Traverse Indian Reservation located in northeastern South Dakota and southeastern North Dakota. The Lake Traverse Indian Reservation was set aside as a "permanent reservation" for the Tribe by the Treaty of February 19,

1867, 15 Stat. 505, Article 3. The reservation encompassed 918,780 acres. *DeCoteau* v. *District County Court,* 420 U.S. 425, 438 n. 19 (1975).

Following enactment of the General Allotment Act, 24 Stat. 388 *et seq.,* the Lake Traverse Indian Reservation was the first reservation to be allotted. "[A]llotment of individual tracts of reservation land to tribal members was already 'virtually completed' " prior to December 12, 1889. *DeCoteau* v. *District County Court, supra,* 420 U.S. at 434. Some 127,887 acres of Reservation land had been allotted prior to that date. *Id.* at 438 n. 19. These allotments were made pursuant to the authority of the General Allotment Act, without benefit of any agreement with the Tribe,[1] and without the consent of the Tribe or its members. The Tribe was never compensated for the lands taken from tribal title and transferred to the fee title of the United States in trust for individual tribal members.

On December 12, 1889, the Tribe "agreed" to sell lands within the Reservation surplus to allotment, provided that all tribal members who had not yet received allotments would be allotted land, and that all members who had not received 160 acres would be allotted additional land in order to provide each tribal member with 160 acres. This agreement was confirmed in the Act of March 3, 1891, 26 Stat. 1035, §§ 26-30. The Tribe's circumstances in the harsh winter of 1889 indicate that the "agreement" was less than willing.

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1. The Lake Traverse Indian Reservation was not part of the Great Sioux Reservation affected by the Act of March 2, 1889, ch. 405, 25 Stat. 888, the allotment provisions of which are at issue in the case at bar.

> The Indians suffering from disease and bad harvests, developed an increasing need for cash and direct assistance.

*DeCoteau* v. *District County Court, supra,* 420 U.S. at 431. The Tribe was in a " 'destitute condition' " and needed the Government to " 'at once take steps to relieve the necessities [of] this long suffering people . . . slowly suffering death from privation and starvation.' " *Id.* at 432 n. 9.

Following the Act of March 3, 1891, members of the Tribe, pursuant to its provisions, received additional allotments totaling some 112,113 acres. *Id.* at 438 n. 19. By 1895, the Reservation had been carved into 1,369 individual allotments with the lands surplus to allotment being sold to non-Indian settlers.

During the last nearly 100 years, the original allotments have passed to successive generations of heirs. The heirs of the original allottees own an ever diminishing fractional interest in the original allotments. Allotments on the Reservation now average thirty heirs. Hearings on S. 2663 Before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess. 61 (1984) (hereinafter "S. 2663 Hearings"). Hundreds of heirs of original allottees gain virtually nothing from their interest in the original allotment. Thus, a "Profile of Lake Traverse Reservation Fractionated Tracts of Land" prepared by the Sisseton Agency of the Bureau of Indian Affairs, shows ten original allotments having 247 to 464 heirs each, with many heirs receiving no annual income from the allotment and, with respect to eight of the allotments profiled, substantially more than half of the heirs receiving less than $1.00 in annual income from the allotment. *Id.* at 60.

The high degree of fractionation renders it impossible for most of the heirs to make any direct beneficial use of their fractional interest. Consequently, the Bureau of Indian Affairs leases the allotments and distributes the piddling income to the heirs.[2] *See,* 130 Cong. Rec. S5601-S5602 (May 10, 1984); 130 Cong. Rec. H11433-H11434 (October 4, 1984).

Beginning in 1974, the Tribe began to explore legislative solutions to the fractionated heirship problem. Act of October 26, 1974, 88 Stat. 1468. At the Tribe's request, this law was amended in 1978 to more effectively address the problem of fractionated heirships. Act of September 30, 1978, 92 Stat. 850. These laws, however, failed to provide a comprehensive approach to controlling the ever increasing fractionation of Reservation allotments.

In 1978, the Tribe determined to seek comprehensive legislation. Between 1978 and 1984, three successive tribal councils shaped legislation to control and eliminate unproductive fractionation of heirship land. Throughout the process, the tribal council held public hearings in each of the Tribe's seven political subdivisions. Many tribal members participated in these hearings and in other hearings on the subject held before the tribal council. The legislation that emerged from this process reflected the input of numerous tribal members, virtually all of them holders of fractional interests in allotments, and expressed the so-

2. In short, the Lake Traverse Indian Reservation allotment process, with its attendant fractionation of tracts, has created a virtual nightmare the complexity and depth of which can only be fully appreciated by reviewing the graphic depiction presented by Bureau of Indian Affairs historian Michael L. Lawson in "Heirship: The Indian Amoeba." *Id.* at 81-89. In 1982, there were 1,693 leases of Indian trust land within the reservation; 58 were held by Indians.

lutions to fractionation endorsed by the tribal council and the members of the Tribe.

At the request of the Tribe, Congress considered the legislation proposed by the Tribe and enacted it. *See,* Act of October 19, 1984, 98 Stat. 2411. The Act includes several different tools for tackling the fractionated heirship problem. Escheat is one of these tools. Under the Act, inheritance of interests in allotments is limited to enrolled members of the Tribe. *Id.*, § 2. However, the Act prohibits any tribal member "by devise or descent to take any interest . . . less than two and one-half acres . . . in trust or restricted land within the reservation." *Id.*, § 5. The interest of nonmembers and any interest less than two and one-half acres of a devisee or intestate distributee escheats to the Tribe. *Id.*, §§ 5 and 6.

The members of the Tribe endorsed the two and one-half acre minimum because this is the standard size of a rural homestead in the tribal community, the Department of Housing and Urban Development requires this amount of acreage as a homestead minimum in its Indian housing program, and because inheritance of a lesser amount would permit the continuation of poor land use caused by fractionation. S. 2663 Hearings, *supra*, at 63-64.

Since enactment, the escheat provisions of the Act of October 19, 1984 have caused fractional interests in certain allotments to revert to tribal title. If the Eighth Circuit decision herein is not reversed or is not narrowly applied to the historical circumstances involving the Great Sioux Reservation and the agreement that resulted in the allotments granted pursuant to the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, the constitutionality of the escheat

provisions of the Sisseton-Wahpeton Sioux Tribe's 1984 Act may be questioned. Without these escheat provisions, the Tribe's ability to control fractionation for the economic betterment of the whole Tribe will be severely impaired and significantly undermined.

## Summary of Argument

For many tribes, the allotment policy has been a disaster, rendering most of the lands affected of little benefit to the tribes and their members. The escheat provision of the Indian Land Consolidation Act, 25 U.S.C. § 2206, facilitates the consolidation of tribal lands in a manner that will ultimately enable the tribe to put the lands to sound economic use for the benefit of all tribal members.

The allotment policy, as practiced with respect to most tribes, unilaterally abrogated tribal title and, without the consent of the tribe or its members, transferred the title to the private ownership of tribal members. The tribes were not compensated for the loss of title. Under these circumstances, the power to dispose of land at death was not a *quid pro quo* for the relinquishment of interests in tribal lands. Heirs of the original allottees never acquired a vested property right to the exercise of such a power and, therefore, Congress may constitutionally regulate the devise or descent of lands that have not as yet passed to the heirs.

It may be that with respect to some tribes, such as those affected by the 1889 Sioux Allotment Act, a vested property right to dispose of land at death, flowing from what was essentially a negotiated contract between the United States and the tribes, may have been acquired by the original

allottees and their heirs. Since this circumstance does not apply to most tribes, any finding affirming the court below should be carefuily limited to the peculiar facts of the 1889 Sioux Allotment Act. The escheat provision of the Indian Land Consolidation Act, on its face, should not be declared an unconstitutional violation of the Fifth Amendment takings clause.

## ARGUMENT

### I.

### SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT DOES NOT VIOLATE THE FIFTH AMENDMENT TAKINGS CLAUSE.

The Eighth Circuit holding that section 207 of the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2206, violates the takings clause of the Fifth Amendment is rooted in "evaluation of the rights created in the [1889 Sioux] allotment statute and patents." 758 F.2d at 1258. The court construed the allotment statute as being "in the nature of a bargain." *Id.* According to the court, the Sioux allottees agreed to relinquish their claims to tribal lands on condition that they would retain the power to dispose of their property at death. *Id.* at 1268-1269. This power, upon execution of the Sioux agreement by the United States, became a vested property right that devolved to and that could be enforced by successors to the original allottee. *Id.*[3]

3. Carried to a logical conclusion, the holding would seem to preclude any regulation of the power that would disinherit successor heirs, contrary to the court's acknowledgement that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause." 758 F.2d at 1262.

Unlike the tribes affected by the 1889 Sioux Allotment Act, the Sisseton-Wahpeton Sioux Tribe witnessed the allotment of most of the Lake Traverse Indian Reservation by Secretarial action unrelated to any agreement negotiated with tribal members. Some additional allotments were issued following the 1891 congressional ratification of an agreement with the Tribe. The "agreement," however was concurred in under severe duress since the members of the Tribe were literally starving to death and were desperate for food, clothing and shelter. Applying the term "agreement" to such circumstances is a misnomer.

Like the Sisseton-Wahpeton Sioux, many tribes suffered the allotment of their reservation lands by unilateral Secretarial action, unconsented to by the members of the Tribe. *See e.g.,* Act of May 29, 1908, 35 Stat. 460, 461-462, construed in *Solem* v. *Bartlett,* —— U.S. ——, 79 L.Ed.2d 443 (1984); the Act of March 22, 1906, 34 Stat. 80, at issue in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); and the Act of June 17, 1892, 27 Stat. 52, discussed in *Mattz* v. *Arnett,* 412 U.S. 481 (1973). That bargains and agreements were not the usual predecessor to the issuance of allotments is not surprising. The "policy of assimilation underlying the allotment policy," *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 660 n. 11 (1976), was bound to meet with resistance from the tribes and their members.

> The objects of this policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian Affairs.

*Id.* at 650 n. 1. As history has clearly revealed, the object of the allotment policy was to diminish Indian landholdings to insignificance by ending tribal relations and breaking up the reservations. *United States* v. *Mitchell*, 445 U.S. 535, 544-545 n. 5 (1980).

The allotment policy, for the Sisseton-Wahpeton Sioux Tribe and the many other tribes upon whom the policy was imposed without consent, resulted in the expropriation without compensation of tribal lands guaranteed to the tribes by treaty, statute or executive order. *See, United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 415 n. 29 (1980). These tribal lands were arbitrarily alloted—transferred to the private ownership of tribal members. Viewed in this light, the escheat provisions of the ILCA and the 1984 Sisseton-Wahpeton Sioux Act merely effect a repatriation to the tribes of lands to which they previously held recognized title.

Since the problems caused by fractionation have rendered substantial acreages of Indian lands virtually useless to tribes and their members, restoring tribal title, by escheat, to certain small interests in land is a measure "tied rationally to the fulfillment of Congress' unique obligation to the Indians." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), *quoting Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). Land in tribal title benefits the tribe and the entire tribal community collectively. Concentration of land in the tribe will not only eliminate fractionation but, over time, will reestablish an economically viable land base for many tribes. For hundreds of tribal members, whose fractional interests are of no or almost no economic value, such concentration will actually enhance their interest, as the tribe will be able to make use

of the land in a way that provides tangible benefits to all members of the tribe. The escheat provisions of the ILCA and the 1984 Sisseton-Wahpeton Sioux Act are a sound way to achieve these ends.[4]

While it may be that specific statutes, like the 1889 Sioux Allotment Act, incorporated an enforceable contractual right, to pass an interest in an allotment to heirs, that cannot be impaired by statutorily imposed escheat, escheat, as provided for in ILCA and the 1984 Sisseton-Wahpeton Sioux Act, does not in most circumstances offend the takings clause of the Fifth Amendment. The interests to be escheated pursuant to these statutes generally have not passed to any heirs. *Northern Cheyenne Tribe* v. *Hollowbreast, supra,* 452 U.S. at 656-660. Therefore, the heirs have not acquired vested rights and Congress has the power to determine which property may descend by will or intestacy. *Mager* v. *Grima,* 49 U.S. 490, 493 (1850); *Jefferson* v. *Fink,* 247 U.S. 288, 294 (1918).[5]

In reviewing the Eighth Circuit decision, *amicus curiae* urges the Court to focus on the application of the ILCA to the peculiar facts pertinent to the 1889 Sioux Allotment Act. The different historical circumstances underlying the allotment of the reservation lands of other tribes suggests an analysis of the constitutionality of the ILCA escheat provision that is also different.

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4. Significantly, these statutes do not affect an heir's property interest during his lifetime. Any tribal member wishing to avoid the escheat provisions of these laws need only make an *inter vivos* transfer of an escheatable interest or purchase fractional interests sufficient to bring the member's interest above the statutory minimum for an inheritable interest. *See, Andrus* v. *Allard,* 444 U.S. 51, 65-66 (1979).

5. Even for heirs with vested rights, hundreds hold interests of no economic value. No compensation would clearly be "just compensation" for the taking of such an interest.

## CONCLUSION

It takes little imagination to predict the future for tribes and their members if fractionation of allotments is not brought under control. Fractionation will continue to increase at an accelerating pace, further diminishing the ability of tribal members to use their land and become self-determining. Non-Indian lessees will be the only beneficiaries of the use of tribal lands.

The Court of Appeals should be reversed. If affirmed, the affirmation should clearly be limited. Any conclusion that 25 U.S.C. § 2206 violates the takings clause of the Fifth Amendment should be tied to the application of the section to the peculiar facts of the 1889 Sioux Allotment Act. The constitutionality of the section should be left unimpaired with respect to tribes that, as part of the allotment process, did not negotiate or bargain for the allottees and their heirs to have an enforceable contractual right to dispose of their property at death.

Respectfully submitted,

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No. 85-637

IN THE

# Supreme Court of the United States

October Term, 1985

DONALD P. HODEL, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS AND SUCCESSORS IN OFFICE,

*Appellant,*

v.

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISCONETTE AS GUARDIAN FOR DUANE CROSS, ANTHONY CROSS, FAITH CROSS AND ALL OTHERS SIMILARLY SITUATED,

*Appellees.*

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## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

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*Appellees.*

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

### I.

### INTEREST OF AMICUS CURIAE

The Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, is an Indian tribe located in the south central part of

the State of Washington. The Yakima Indian Nation's status as a sovereign entity was reserved in the *Treaty with the Yakimas,* which was executed on June 9, 1855, ratified on March 8, 1859, and proclaimed on April 18, 1859. (12 Stat. 951.) From lands exceeding ten million acres ceded to the United States, the *Treaty with the Yakimas* reserved the Yakima Indian Reservation. The Yakima Indian Reservation has a total area of 1,367,105 acres. Within said Yakima Indian Reservation, the Yakima Indian Nation owns 842,978 acres. Individual Indians are allotted 274,988 acres and the remaining 249,416 acres are held in non-trust or non-restricted title by others — mostly non-Indians.

Since 1955, under the Act of July 28, 1955, ch. 423, 69 Stat. 392, as amended by the Act of August 31, 1964, Pub. L. 88-540, 78 Stat. 748 (codified at 25 U.S.C. Secs. 608-608c), the Yakima Indian Nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise.

Under Section 7 of the Act of August 9, 1946, ch. 933 Sec. 7, 60 Stat. 968 (codified as amended at 25 U.S.C. 607), the Yakima Indian Nation acquired the interests of allottees whose heirs did not possess the requisite blood quantum specified by this Act without compensation. *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd,* 384 U.S. 209 (1966). The above described Section 7 was amended by the Act of December 31, 1970, Pub. L. 91-627, 87 Stat. 1874, to provide allottees' heirs with compensation for the interests flowing to the Yakima Indian Nation. Congressional legislative history indicates that the basis for this amendment was that Congress considered the taking unfair. Senate Report No. 91-1384, 3 U.S. Cong. & Admin. News '70, p. 5783.

Under this amended Section (codified as amended at 25 U.S.C. 607), the Yakima Indian Nation has acquired, and is now purchasing, the interests of members and non-

members not possessing the necessary one-fourth blood quantum of the antecedent tribes and bands. This action provides for the consolidation of fractionated interests, fosters fair enrollment practices and provides fair compensation for these tribally-acquired interests. All without the internal disruption that results from these interests being acquired without compensation.

The Yakima Indian Nation's land consolidation and enrollment practices have promoted land consolidation, therby reducing federal expenditures regarding administration of fractionated interests in Yakima Reservation allotments. As the Government has noted, reduction of federal expenditures is a primary purpose of Section 207 of the Land Consolidation Act, 25 U.S.C. 2206, and Section 207 of the Act of October 30, 1984, Pub. L. 98-608, 98 Stat. 3173, (25 U.S.C. 483a). Jurisdictional Statement pp. 7, 22 n.5. The Government appeal goes even further and notes that "[t]he legislative history of Section 207 strongly reflects Congress' intention that the Act not result in any cost to the United States." The Government's presentation is a clear showing that Section 207 lacks any real tie to the trust obligation of the United States.

The Yakima Indian Nation's land consolidation plan operating under the foregoing federal laws relating to the Yakima Indian Nation, codified at 25 U.S.C. Sections 607, 608-608c, fosters consolidation and further provides that the heirs receive compensation for tribally-acquired interests. The provisions now before this Court in 25 U.S.C. 2206, save the United States monies involved in administering fractionated interests; but these provisions do so arbitrarily and in violation of the United States' fiduciary responsibility, thus unconstitutionally placing the entire financial burden of this federal saving on individual Indians. It is this effect of 25 U.S.C. 2206 on the members of the Yakima Indian Nation and other Indians that the Yakima Indian Nation opposes and is the reason that the Government's appeal is opposed in this brief.

## II.

## ARGUMENT

The holding of the Court of Appeals for the Eighth Circuit is correct. The Constitution itself dictates respect for settled economic arrangements by banning legislation that impairs contractual arrangements or takes property without just compensation. Although the protection of settled economic arrangements from federal legislation is not explicity within the Contract Clause, the Due Process Clause of the Fifth Amendment has much the same effect. *See Lynch v. United States,* 292 U.S. 571 (1934). The protection that settled economic arrangements receive regards taking without compensation is explicit in the final clause of this Fifth Amendment. The Court of Appeals, like this Court, knows a taking when it sees it and was not impressed by the Government's emphasis on de minimus. This Court should affirm. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

Transcending the Court of Appeals' determination of an uncompensated taking, the holding of the Court of Appeals should be sustained regardless of the existence or non-existence of vested property interests or their taking.

Inherent in the Court of Appeals holding 25 U.S.C. 2206 unconstitutional is this Court's requirement that the constitutional legislative power of Congress — regarding Indian property — must be tied rationally to the trust obligations of the United States. The record in this case shows just the opposite. The United States and Congress have breached any fiduciary responsibility. Their conflict of interest is recorded and overpowering. The unilateral placing the cost burden of consolidation for the financial benefits of consolidation flowing to the trustee on these Indian wards is contrary to this fiduciary relationship and is impermissible. Legalisms abound in the decisions below and in the Government's opening brief; but underlying the sec-

tion under attack is the bottom line that Congress abused the trust responsibility to Indians that is the basis of its legislative power over alienation of the trust properties involved.

This guardian-ward relationship was first noted by this Court in *Cherokee v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). This Court has continued to construe statutes under this indisputable existence of a general trust relationship between the United States and the Indian people. *United States v. Mitchell,* 463 U.S. 206, 225 (1983).

Indeed it is this guardianship theory that this Court distinctly relied upon as the basis for congressional power over Indians. *United States v. Kagama,* 118 U.S. 375 (1886). While this Court has not cited trust responsibility as the sole source of congressional power since *United States v. Candelaria,* 271 U.S. 432 (1926), this Court has made it clear that the constitutional standard for judicial review of Indian legislation is whether the legislation under attack serves this fiduciary responsibility. *Delaware Tribal Business Community v. Weeks,* 430 U.S. 73, 83-85 (1977).

In *Delaware Tribal Business Community v. Weeks, supra,* this Court rejected arguments seeking to establish that the power of Congress is so pervasive as to render its legislation not subject to judicial consitutional review. Instead, this Court held that the constitutional standard for judicial review was whether the legislation under attack was "tied rationally to the fulfillment of Congress' unique obligations towards Indians". 430 U.S. at 85. Where Congress is exercising its authority over Indians rather than some other distinctive power, this trust obligation requires that its statutes be based on a determination that the Indians will be protected. Otherwise, such statutes are not rationally related to the trustee obligation. *United States v. Sioux Nation,* 448 U.S. 471 (1980). The trustees' conflict in the instant case is obvious.

Under the admitted facts of the attacked escheat section enactment, Congress did not make good faith efforts to protect its Indian wards and see that they receive full value and be free from the burden of unfair restrictions. This is the approved test of this Court in *United States v. Sioux Nation, supra.* It is clear that Congress was more interested in reducing administrative obligations of the United States than in protecting its wards. In other words, Congress was looking out for the interests of the United States, not those of its wards. Requiring that compensation be given for the interests flowing to the tribes would have been very easy for Congress to do. Congress has so provided in the legislation regarding interests flowing to the Yakima Nation under land consolidation legislation pertaining to the Yakima Reservation. 25 U.S.C. 607. The Government describes the interests that are lost as de minimus. If they are so de minimus, tribes could readily provide funds for adequate compensation. Further, there was no showing that Congress could not, in its own as well as its wards' interests, provide funds for acquisition to reduce administrative costs that was so clearly the primary goal of Congress. In the enactment of 25 U.S.C. 2206, Congress was fostering the interests of the United States, not its Indian wards.

## III.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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**On Appeal from the United States Court of Appeals for the Eighth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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No. 85-637

In The
# Supreme Court of the United States
October Term, 1985

DONALD P. HODEL, Secretary of the Interior,
*Appellant,*

v.

MARY IRVING; et al.,
*Appellees.*

On Appeal from the United States
Court of Appeals for the Eighth Circuit

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

### INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellees, Mary Irving, *et al.* Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief.

At issue in this case is property that was held by Irving's decedents (decedents) which was subject to Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2206. Section 207 classified certain property interests held by decedents as being *de minimis* and therefore not capable of being devised to potential heirs. Instead this property escheats to the tribe. The stated purpose of Section 207 is to prevent the further fractionation of property interests held by Sioux Indians. However, it is the position of amicus curiae, Pacific Legal Foundation, that Section 207 attempts to remedy a recognized problem through a constitutionally invalid method. If individual rights in property are to be preserved, the constitutional guarantee that just compensation must be paid when private property is taken by government must be applied whenever a taking of a property interest occurs. Allowing Congress to set an arbitrary level of value which must be met before the taking of a particular property interest requires compensation would vitiate the constitutional protection of the Fifth Amendment.

Pacific Legal Foundation's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 758 F.2d 1260 (8th Cir. 1985).

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## SUMMARY OF ARGUMENT

The application of Section 207, as originally enacted, deprives the estates of certain Sioux Indians of all interests in certain property held by the decedents. This mandated forfeiture of property was enacted against an identifiable class of persons without notice or reasonable opportunity to protect the property interests at stake and with no provision for the payment of compensation.

The appellant, Donald P. Hodel, argues that under the three part analysis formulated by this Court in *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 124 (1978), no taking of a private property interest has occurred. The analysis set forth in *Penn Central,* however, applies to those situations where the government is *regulating* the use of property. This case involves no regulation of the use of property. The property interest is simply forfeited. Thus, the *Penn Central*

analysis is inapplicable. To determine if a taking of property has occurred in this case it is only necessary to analyze the nature of the interest at issue to determine if it is deserving of constitutional protection. Whether constitutional protection is required is dependent on the nature of the interest not its monetary value. The interest need not be a fundamental common law property interest. It is sufficient that an expectancy of a protected interest has been created by statute or accepted by practice. Although individuals may lose such interests to government action, the deprivation may occur only in a constitutionally acceptable manner.

The application of Section 207 to decedents' property effectively deprives the decedents' estates of the entire property interests. Such a drastic revision to the established concept of property must provide notice and a reasonable opportunity to avoid the forfeiture if constitutional mandates are to be met. Section 207 incorporates no provision to protect the individual rights in property affected by its application. It therefore fails to meet the minimum concepts of fairness embodied in the Due Process and Taking Clauses of the Fifth Amendment.

# I

## THE APPLICATION OF SECTION 207 EFFECTS A TAKING OF PRIVATE PROPERTY

### A. The Three Part Analysis Formulated by This Court in Penn Central Transportation Company v. New York City Is Not Applicable to the Circumstances of This Case

Hodel argues that this case is controlled by the analysis in *Penn Central,* 438 U.S. at 124, where this Court stated that whether a regulation effects a taking of property depends on "[t]he economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." This three part analysis, however, was developed to aid in determining whether a regulation of the use of property constituted a taking. In *Penn Central* the City of New York prevented the Penn Central Transportation Company, which owned Grand Central Terminal, from constructing a multistory office building on top of the terminal. The city did not remove the terminal from Penn Central's ownership, it merely regulated the manner and use of the terminal property.

When the owner of property retains title but a claim is made that the regulation of use goes too far and effects a taking of the property, the *Penn Central* test enables the reviewing court to evaluate the effect on the property under the circumstances of the particular case. Hodel's attempt to characterize Section 207 as such a regulation of property use, however, is disingenuous. The intent of

Congress and the actual effect of Section 207 is to transfer ownership from one party to another. It makes little sense to speak of the character of the governmental action, the economic impact, and the interference with investment backed expectations when there has been a total deprivation of property. For the same reasons Hodel's reliance on *Andrus v. Allard*, 444 U.S. 51 (1979), is misplaced. In *Allard* this Court emphasized that "it is *crucial* that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66 (emphasis added). The estates in this case retain no rights at all. Section 207 transfers all interest in the property to the tribe. The only analysis needed in the present case is whether Section 207 destroyed a protected property interest. If it did, then the protections of the Fifth Amendment apply.

### B. Sioux Indian Property Owners Who Took Title Prior to the Enactment of Section 207 Had a Reasonable and Legitimate Expectation of a Power to Dispose of the Property at Time of Death Which Is a Protected Interest Under the Fifth Amendment

The brief for appellee recounts the historical basis for the claim by the affected Sioux Indians to a protected interest in passing their property to their family on death. In the context of the Due Process Clause it has long been recognized that an individual will be found to have a property interest if he or she has "a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Such a "claim of entitlement" can be created expressly by statute, *id.* at 577, or implied by government action. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

Similar interests have been recognized as protected by the Just Compensation Clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. —, 104 S. Ct. 2862 (1984), one of the more recent decisions of this Court applying the Just Compensation Clause, is an example of such a case.

In *Ruckelshaus* the Court was faced with the question of whether the data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act violated the Just Compensation Clause. A manufacturer alleged that the disclosure of data by the Environmental Protection Agency (EPA) constituted a taking of property without the payment of just compensation in violation of the Fifth Amendment. The Court determined that the manufacturer did have a property interest protected by the Constitution in the data supplied to EPA. *Id.* at 2874. The Court based this conclusion on a consideration of whether under the circumstances of that case, the manufacturer had a legitimate expectation that its data would be kept confidential when submitted to EPA. *Id.* at 2876-78. The Court concluded that for the period from 1972 to 1978, the manufacturer did have such an expectation which resulted from an explicit guarantee by the federal government that data provided by the manufacturer would be kept confidential. Although in *Ruckelshaus* as in this case the statute was amended to remove the provisions which created the protected interest, this Court ruled nonetheless that disclosure of data which destroyed the interest in confidentiality created prior to the amendment would constitute a taking. *Id.* at 2879. Although the Court recognized that some "restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community,' " *id.* at 2875, quoting *Andrus v. Allard*,

444 U.S. at 67, those restrictions are limited when a protected property interest arises from "the expectations of the submitter." *Ruckelshaus,* 104 S. Ct. at 2879 n.17.

The holding in *Ruckelshaus v. Monsanto Co.* clearly establishes that property interests protected by statute are not subject to destruction by statutory amendment without regard for the reasonable and legitimate expectations created by the statute in affected property owners. This Court recognized in *Choate v. Trapp,* 224 U.S. 665 (1912), that a reasonable and legitimate expectation held by Indian property owners that their allotments would maintain tax-exempt status for a stated period of time was a protected interest under the Constitution. Similarly, in this case, given the long-standing legal rights established by the Act of March 2, 1889, ch. 405, 255 Stat. 891, and the Act of June 25, 1910, ch. 431, 36 Stat. 855, the Sioux Indian landowners who held title before the enactment of Section 207 had a reasonable and legitimate expectation that they would be capable of disposing of their property to their heirs at the time of their death. This reasonable and legitimate expectation is a property interest subject to constitutional protection.

### C. Constitutional Protection of Property Is Not Dependent Upon the Size of the Interest at Issue

Hodel states that "[o]f the 41 interests in allotments in this case that escheated to the tribe pursuant to Section 207, 17 earned less than $1.00 in the preceding year, 29 earned less than $5.00, and all but two earned less than $10.00" (Brief for the Appellant at 33), and that "Congress reasonably could determine that such an interest is sufficiently de minimis in its relative economic value and

reflects a sufficiently insubstantial stake in the allotted parcel as a whole to warrant its devolution to the tribe in lieu of still further fractionation." Brief for the Appellant at 33.

Thus, Hodel asserts that the property interests at stake in this case are not deserving of constitutional protection because they are too small. However, constitutionally mandated protection of property is not dependent upon the size of the interest at stake, but upon the nature of the interest.

"[W]e must look not to the 'weight' but to the *nature* of the interest at stake. [Citation omitted.] We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. at 571 (emphasis in original). "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The focus on the nature of the interest is evident in *Fuentes v. Shevin*, 407 U.S. 67 (1972), where this Court held that constitutional protection is required to be accorded household goods taken under a prejudgment writ of attachment even though the deprivation is only temporary, full legal title is held by other individuals and the household goods cannot be considered as necessities. *Id.* at 85-90.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, — U.S. —, 88 L. Ed. 2d 662 (1986), a Nebraska prison inmate sued prison officials for the loss of certain hobby materials which were

lost after delivery to the prison. The hobby materials were valued at $23.50. *Id.* at 529. This Court recognized that the hobby materials, even though valued at only $23.50, were subject to constitutional protection. "Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536. If a hobby kit valued at $23.50 is deserving of constitutional protection then clearly the interests in property forfeited under Section 207 are deserving of protection. Properties earning $99 per year could have capitalized values approaching $1,000.

This Court has reached a similar conclusion in an analogous situation. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court analyzed whether a state law which allowed the attachment of cable television cables and wiring boxes to buildings without the consent of the owners constituted a taking of property without just compensation. The space required for the attachment of the wiring boxes amounted to one and one-half cubic feet. *Id.* at 438 n.16. In holding that the attachment of cables and wiring boxes constituted a physical invasion this Court stated: "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. The extent of the physical invasion was significant only in determining the amount of compensation owed.

In *United States v. Causby*, 328 U.S. 256, 261 (1946), and *Boston Chamber of Commerce v. City of Boston*,

217 U.S. 189, 195 (1910), this Court held that the value of property should be determined by the owner's loss and not by what the taker has gained. A determination by Congress that the property interests are *de minimis* cannot override the significance of the property interest to the owners. Whether the owner of a property interest subject to Section 207 will consider income of up to $99 per year to be significant will depend on individual circumstances. Although Hodel states, "the owner of an undivided interest in an allotted parcel *almost* invariably does not occupy or use the land," Brief for the Appellant at 32 (emphasis added), this does not mean that such occupation is not possible. It is apparent that some of the property interests at issue in this case are sufficiently large to accommodate occupation if other circumstances were to allow it. *See* Joint Appendix (JA) at 12-13. Accepting Hodel's claim that constitutional protection of property can be withdrawn whenever Congress determines the interest to be negligible would be a far-reaching step in the process of eliminating the right to private property.

The Just Compensation Clause of the Fifth Amendment does not protect the property itself but the owner's personal interest in it. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). It is clear, therefore, that although some of the property interests may be considered small, the size of the interest is not determinative of whether it is constitutionally protected. The nature of the interest and the potential value of the property to the Sioux Indian owners in this case indicate it is a property right protected by the Constitution.

## II

## SECTION 207 FAILS TO PROVIDE THE CONSTITUTIONALLY REQUIRED REASONABLE OPPORTUNITY FOR THE PROPERTY OWNERS TO TAKE STEPS TO AVOID ESCHEAT OF THEIR PROPERTY

In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), this Court recognized that statutory modifications of established property interests are subject to constitutional limitations. The Indiana statute at issue in *Texaco, Inc. v. Short* provided that a severed mineral interest which had not been developed for a period of 20 years would revert to the current surface owner. The statute, however, provided that lapse could be avoided

> "[i]f the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so . . . [i]f the owner pays taxes, no matter how small . . . [or] [i]f the owner files a written statement of claim in the county recorder's office." *Id.* at 529.

In addition to these protections a two-year grace period was included which provided time for affected individuals to become familiar with the statute. *Id.* at 518. This Court expressly concluded that a created property interest "is entitled to constitutional protection." However, that constitutional protection does not deprive the state of "the power to condition the permanent retention of that property right on the performance of *reasonable* conditions that indicate a present intention to retain the interest." *Id.* at 526 (emphasis added). This Court's analysis emphasized the importance of the inclusion of a two-year grace period to allow affected property owners the opportunity to protect their interests:

> "In short, both the Indiana Legislature and the Indiana Supreme Court have concluded that a 2-year period was sufficient to allow property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests. On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this 2-year period was constitutionally inadequate." *Id.* at 532-33.

Although Hodel argues that affected property owners had the power to avoid forfeiture of the property under Section 207, Brief for the Appellant at 9-10, no grace period was provided to grant property owners the time required to complete the intervivos transfers necessary to avoid escheat. Under the Indiana statute the property owner had two years to file "a written statement of claim." *Id.* at 529. Under Section 207 Sioux Indians, many of whom can be expected to have little knowledge of legal transactions related to real property, are given no specified time to learn of the effect of the statute and to consummate intervivos transfers or "to apply to the Secretary for a partition of the tract." Brief for the Appellant at 10. Moreover there is a serious question of the reasonableness of the options available. Contrary to the simple tasks which preserved the property interest at stake in *Texaco, Inc. v. Short*, the time involved to complete the actions necessary to avoid forfeiture under Section 207 may be substantial, particularly in light of the nature of the property interests involved.

The fate suffered by Geraldine Poor Bear Cross is instructive. After the effective date of Section 207 she attempted to provide for her five minor children to receive the property. Obviously unaware of Section 207 she attempted to devise the property rather than to make gifts of her interests. Brief for the Appellant at 34 n.20. As a result her minor children lost at least 26 separate interests in property. Brief for the Appellant at 13. The purpose of the Fifth Amendment is to ensure that government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although Section 207 may benefit the tribe and improve the administration of certain lands, these reasons do not justify an unconstitutional taking: "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

There is no justification for concentrating on the minor children of Geraldine Poor Bear Cross the costs of improving the administration of trust lands. Alternative constitutionally valid methods exist by which the same governmental objectives may be accomplished. *See* Amicus Brief of the Yakima Indian Nation at 2 ("the Yakima Indian nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise"). A grace period and other procedural safeguards could be included in Section 207 to provide reasonable assurance that protected interests are lost only when owners have knowledge of the pending forfeiture and have failed to take reasonable steps to avoid

the loss. The summary termination of the protected property interests of these Sioux Indians cannot be justified under these circumstances.

## CONCLUSION

The application of Section 207 under the circumstances demonstrated by this case deprives Sioux Indian property owners of protected property interests in violation of the Fifth Amendment.

For the reasons set forth herein, amicus curiae, Pacific Legal Foundation, respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit.

DATED: May, 1986.

Respectfully submitted,

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